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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-48

In the Matter of

Amendment of Section 73.202(b),	RM-5772
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FM Broadcast Stations	RM-6533
(Arlington, McKinney, Celina,	RM-6534
Terrell, Daingerfield, College	RM-6535
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and Durant, Oklahoma.[1])	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 23, 1990; Released: April 23, 1990

By the Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause* in this proceeding, 3 FCC Rcd 964 (1988), proposing the substitution of Channel 235C for Channel 235C1 at Arlington, Texas, and the modification of the license of Station KHYI, Channel 235C1, Arlington, Texas, to specify operation on Channel 235C. In order to accommodate this channel substitution, it is necessary to propose the substitution of Channel 295A for Channel 237A at McKinney, Texas, and modification of the license of FM Station KSSA (formerly KWPL), Channel 237A, McKinney, Texas, to specify operation on Channel 295A. To this end, the *Order to Show Cause* was issued against Oaks Broadcasting of Texas, Inc., licensee of Station KSSA. The *Notice* also included a separate petition for rule making filed by McKinney Broadcasting Company proposing the allotment of Channel 295A McKinney, Texas, as a new local service.[2] After consideration of this entire proceeding, we are substituting Channel 235C for Channel 235C1 at Arlington, and modifying the license of Station KHYI to specify operation on Channel 235C. To accommodate this upgrade, we are substituting Channel 295A for Channel 237A at McKinney, Texas, and modifying the license of Station KSSA, McKinney, Texas, to specify operation on Channel 295A.[3] We are also substituting Channel 297C3 for Channel 221A at College Station, Texas, and modifying the license of Station KTSR, Channel 221A, College Station, Texas, to specify operation on Channel 297C3. Finally, we are allotting Channel 237A to Howe, Texas, as a new service.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by Statewide Broadcasting, Inc., former licensee of Station KHYI, Channel 235C1, Arlington, Texas, proposing the Channel 235C upgrade and Station KHYI license modification.[4] This channel substitution required the substitution of Channel 295A for Channel 237A at McKinney, Texas, and modification of the license of Station KSSA, Channel 237A, McKinney, to specify operation on Channel 295A. A separate petition for rule making was filed by McKinney Broadcasting Company proposing the conflicting allotment of Channel 295A to McKinney as a second local FM service. These conflicting petitions for rule making were consolidated into the *Notice* along with the *Order to Show Cause* directed against the licensee of Station KSSA.

3. In response to the *Notice*, we received five counterproposals. The first counterproposal was filed by Hicks Communications, Inc., licensee of Station KTSR, Channel 221A, College Station, Texas, proposing the substitution of Channel 235C2 for Channel 221A at College Station, and modification of the Station KTSR license to specify operation on Channel 235C2.[5] In order to accommodate this upgrade, Hicks proposes the substitution of Channel 297A for Channel 236A at Caldwell, Texas. The second counterproposal was filed by Metro Broadcasters, Inc., licensee of Station KTLR-FM, Channel 296A, Terrell, Texas, proposing the substitution of Channel 295C2 for Channel 296A at Terrell and modification of its Station KTLR-FM license to specify operation on Channel 295C2. In order to accommodate this upgrade, Metro proposes the substitution of Channel 259A for Channel 295A at Daingerfield, Texas.[6] The third counterproposal was filed by Durant Broadcasting Corporation, licensee of Station KLBC, Channel 296A, Durant, Oklahoma, proposing the substitution of Channel 296C2 for Channel 296A at Durant, and modification of its Station KLBC license to specify operation on Channel 296C2.[7] The fourth counterproposal was filed by Ronald Strother proposing the allotment of Channel 237C2 to Celina, Texas, as a first local service.[8] The fifth counterproposal was filed by Patrick McCauley proposing the allotment of Channel 237A to Howe, Texas, as a first local service.[9]

4. On May 18, 1989, Evergreen Media Corporation of Dallas, Inc. ("Evergreen"), present licensee of Station KHYI, filed supplemental comments.[10] In these supplemental comments, Evergreen has included statements from other parties in this proceeding either withdrawing or amending their proposals looking toward a resolution of this docket. The first statement was from Divcon Associates, Inc., proponent for the Channel 295A allotment at McKinney as a second local service, withdrawing its proposal. This proposal had conflicted with Evergreen's proposal to substitute Channel 295A for Channel 237A at McKinney. The second statement was from Durant Broadcasting Corporation, proponent for the Channel 296C2 for Channel 296A substitution at Durant, Oklahoma, withdrawing its proposal. The proposed Channel 296C2 upgrade at Durant had conflicted with Evergreen's proposed Channel 295A substitution at McKinney. The third statement was from Hicks Communications, Inc., proponent for the Channel 235C2 for Channel 221A substitution at College Station, Texas, amending its Channel 235C2 substitution to specify Channel 297C3. The fourth statement was from Charles Johnson, proponent for the Channel 295A allotment at McKinney, withdrawing his interest in this allotment. The fifth statement was from McKinney Broadcasting Company, the original petitioner for the Channel 295A allotment at McKinney, withdrawing its proposal. New College Station Broadcasting Company submitted a statement withdrawing its interest in a Channel 235C2 allotment at College Station. The seventh

statement was from Ronald Strother, proponent for Channel 237C2 at Celina, Texas, withdrawing his proposal. This proposal had conflicted with Evergreen's proposed Channel 235C upgrade at Arlington.

5. At this juncture, there is no longer any impediment to the Channel 235C upgrade at Arlington, and the related Channel 295A substitution at McKinney. Accordingly, we are substituting Channel 235C for Channel 235C1 at Arlington, Texas, and modifying the license of Station KHYI, Channel 235C1, Arlington, to specify operation on Channel 235C.[11] In order to accommodate this upgrade, we are also substituting Channel 295A for Channel 237A at McKinney, Texas, and modifying the license of Station KSSA, Channel 237A, McKinney, Texas, to specify operation on Channel 295A.[12] We are also substituting Channel 297C3 for Channel 221A at College Station, Texas, and modifying the license of Station KTSR, Channel 221A, College Station, to specify operation on Channel 297C3.[13] Finally, we are allotting Channel 237A to Howe, Texas, as a first local FM service.[14]

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 7, 1990,** the Table of FM Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the communities listed below, to read as follows:

City	Channel No.
Arlington, Texas	235C
College Station, Texas	297C3
Howe, Texas	237A
McKinney, Texas	295A

7. The window period for filing applications for the Channel 237A allotment at Howe, Texas, will open on **June 8, 1990,** and close on **July 9, 1990.**

8. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's Rules, that the license of Evergreen Media Corporation of Dallas, Inc. for Station KHYI, Channel 235C1, Arlington, Texas, IS MODIFIED effective **June 7, 1990,** to specify operation on Channel 235C in lieu of Channel 235C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Rules.

9. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communication's Act of 1934, as amended, and Section 0.283 of the Commission's Rules, that the license of Station KSSA, Channel 237A, McKinney, Texas, IS MODIFIED effective **June 7, 1990,** to specify operation on Channel 295A in lieu of Channel 237A, subject to the following conditions:

(a) Nothing contained herein shall be construed to authorize any change in BLH-850208KS except the channel as specified above. Any other changes, except for those specified under Section 73.1690 of the Rules, requires prior authorization for construction permit (FCC Form 301).

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with License BLH-850208KS except for the channel as specified above and a license application (FCC Form 302) is filed within 10 days of the commencement of program tests.

10. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's Rules, that the license of Hicks Broadcasting Corporation for Station KTSR, Channel 221A, College Station, Texas, IS MODIFIED effective **June 7, 1990,** to specify operation on Channel 297C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (FCC Form 301) specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Rules.

11. IT IS FURTHER ORDERED, That the aforementioned petition for reconsideration filed by Metro Broadcasters, Inc. IS DISMISSED.

12. IT IS FURTHER ORDERED, That the aforementioned counterproposal filed by Metro Broadcasters, Inc. proposing the substitution of Channel 295C2 for Channel 296A, and license modification at Station KTLR-FM, Terrell, Texas, IS DISMISSED.

13. IT IS FUTHER ORDERED, That the petition for rule making filed by McKinney Broadcasting Company (RM-5772) proposing the allotment of Channel 295A to McKinney, Texas, IS DISMISSED.

14. IT IS FURTHER ORDERED, That the counterprosal filed by Durant Broadcasting Corporation (RM-6534) proposing the substitution of Channel 296C2 for Channel 296A, and license modification at Station KLBC-FM, Durant, Oklahoma, IS DISMISSED.

15. IT IS FURTHER ORDERED, That the counterproposal filed by Ronald Strother (RM-6533) proposing the allotment of Channel 237C2 to Celina, Texas, IS DISMISSED.

16. IT IS FURTHER ORDERED, That the aforementioned counterproposal filed by Radio Plano, Inc. (RM-6536) proposing the substitution of Channel 237C2 for Channel 237A, and license modification at Station KSSA, McKinney, Texas, IS DISMISSED.

17. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

18. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The communities of Celina, Terrell, Daingerfield, College Station, Caldwell, and Howe, Texas, and Durant, Oklahoma have been added to the caption.

[2] Comments were filed by Oaks Broadcasting of Texas, Inc., Martin Sanberg, Charles Johnson, Divcon Associates, Inc., Radio Plano, Inc., H&G Communications of Dallas, Inc., Ronald Strother, Metro Broadcasters, Inc., Durant Broadcasting Corporation, McKinney Broadcasting Company, and Hicks Communications, Inc. Included in the comments filed by H&G Communications of Dallas, Inc., were counterproposals from Patrick McCauley, Scott K. Ginsburg, Entertainment Plus, Inc., and James Henry. A supplement to comments and reply comments was filed comments was filed by Durant Broadcasting Corporation. Reply comments were filed by Roy E. Henderson, Divcon Associates, Inc., Metro Broadcasters, Inc., Radio Plano, Inc., Ronald Strother, H&G Communications of Dallas, Inc., Scott K. Ginsburg, Entertainment Plus, Inc., Evergreen Media Corporation of Dallas, Inc., Hicks Communications, Inc., Kevin Patrick McCauley, James Henry, and New College Station Broadcasting Company. Evergreen Media Corporation of Dallas, Inc., filed supplemental comments.

[3] Radio Plano, Inc., proposed assignee of Station KSSA, McKinney, Texas, filed a "contingent" counterproposal proposing the substitution of Channel 237C2 for Channel 237A at McKinney, and modification of the Station KSSA license to specify operation on Channel 237C2. In this counterproposal, Radio Plano, Inc. expressly states that it does not oppose the Channel 295A for Channel 237A substitution at McKinney, and that its counterproposal is contingent on that substitution not being adopted. In view of our action in this proceeding substituting Channel 295A for Channel 237A at McKinney, we are dismissing this counterproposal.

[4] Evergreen Media Corporation of Dallas, Inc., is now the licensee of Station KHYI (File No. BTCH-880622EF).

[5] Public Notice was given on November 14, 1988 (Report No. 1758).

[6] The proposed Channel 259A allotment at Daingerfield conflicts with a proposed Channel 259C1 upgrade at Shreveport, Louisiana. The proposed Channel 259C1 upgrade was submitted by James A. Reeder as a timely counterproposal in MM Docket No. 84-231. Inasmuch as Metro did not submit its Daingerfield substitution by the May 14, 1984 comment date in MM Docket No. 84-231, it is being dismissed as untimely. In a related matter, Metro has filed a petition for reconsideration directed against the exclusion of its counterproposal from the Public Notice listing other counterproposals in this proceeding. Because exclusion from a list is not a final action subject to a petition for reconsideration, we dismiss Metro's petition for reconsideration.

[7] Public Notice was given on October 7, 1988 (Report No. 1752).

[8] Public Notice was given on October 7, 1988 (Report No. 1752).

[9] Public Notice was given on October 7, 1988 (Report No. 1752). Patrick McCauley included this counterproposal in the comments filed by H & G Communications of Dallas, Inc., successor licensee of Station KHYI, Arlington, Texas. Also included among these comments was a counterproposal by Scott K. Ginsburg proposing the allotment of Channel 229A to Whiteboro, Texas, a counterproposal by Entertainment Plus, Inc. proposing the allotment of Channel 260A to Whitewright, Texas and a counterproposal by James Henry proposing the allotment of Channel 277A to Van Alstyne, Texas. These latter three counterproposals are not in conflict with any proposed allotment in this proceeding and will be considered in separate proceedings.

[10] In view of the fact that these comments will lead to a resolution of this proceeding, we are accepting these comments on our own motion.

[11] The reference coordinates for Channel 235C at Arlington, Texas, are 32-35-22 and 96-58-10.

[12] The reference coordinates for Channel 295A at McKinney, Texas, are 33-15-49 and 96-35-54.

[13] Channel 297C3 at College Station, Texas, requires a site restriction of 17.3 kilometers (10.8 miles) south. The reference coordinates are 30-39-00 and 96-10-08.

[14] The reference coordinates for Channel 237A at Howe, Texas, are 33-30-24 and 96-36-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-388

In the Matter of

Amendment of Section 73.606(b), RM-5385
Table of Allotments,
TV Broadcast Stations.
(Kenansville, Florida)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 27, 1990; Released: April 23, 1990

By the Chief, Policy and Rules Division:

1. Before the Commission is a petition for reconsideration filed by Meredith Corporation ("Meredith") of the *Report and Order* ("*R&O*"), 2 FCC Rcd 7194 (Chief, Allocations Br. 1987), denying Meredith's request for an allotment of UHF Channel 31 to Kenansville, Florida, as that community's first local television service. Wabash Valley Broadcasting Corporation ("Wabash") filed an opposition and Meredith filed a reply.

BACKGROUND

2. The Chief, Allocations Branch, issued a *Notice of Proposed Rule Making*, 1 FCC Rcd 143 (1986), in response to Meredith's request for an allotment of Channel 31 to Kenansville. The Chief requested that Meredith present information showing that Kenansville is a community for allotment purposes. Meredith submitted evidence that Kenansville, founded in 1914, has a population of approximately 700, a post office, its own zip code, its own telephone exchange, the First Missionary Baptist Church of Kenansville, a cemetery, the Kenansville Volunteer Fire Department, the Kenansville Community Center, several Kenansville civic groups, and several businesses. Residents have private wells and septic tanks. Osceola County provides schools, police protection, and garbage collection. Commenters in opposition claimed that Meredith would violate the Commission's multiple ownership rules, 47 C.F.R. § 73.3555, by applying for a full service station at Kenansville, because Meredith is the licensee of WOFL-TV, Orlando, Florida, a community 80.5 kilometers (50 miles) from Kenansville. Opponents also maintained that Meredith would operate a Kenansville station as a 100% satellite operation of WOFL-TV. In reply, Meredith conceded that it would request permission to operate the Kenansville station as a satellite station, but argued that the ultimate intent for the use of the channel was irrelevant to the proceeding.

3. The Chief denied Meredith's petition, determining that Meredith failed to demonstrate Kenansville's community status. The Chief found that Meredith failed to indicate whether the indicia of community status cited by Meredith are connected to Kenansville, located within another community, or if the services are provided by the county. The Chief stated, "[W]e have reservations as to exactly how much economic activity exists at Kenansville." *R&O*, 2 FCC Rcd at 7195. In addition, the Chief noted that Osceola County provides police, schools, and garbage collection for Kenansville, and that Kenansville lacked a city hall, local government, bank, and newspaper. Finally, the Chief noted that Commission rule 73.3555 exempts satellite stations from a strict application of the Grade B overlap prohibition.

4. In its petition for reconsideration, Meredith claims that the Chief misapplied the test for community status by requiring Meredith to prove that Kenansville evidences every indicia of community status as well as a coalescence of community interest. Instead, Meredith claims, the Chief should have determined whether the evidence taken as a whole indicates that residents of Kenansville conceive of themselves as a community. Meredith claims that the burden of proving community status is not stringent, citing *Beacon Broadcasting*, 2 FCC Rcd 3469 (1987), *aff'd* 2 FCC Rcd 7562 (1987). Meredith claims that Kenansville is a geographically defined area as evidenced by the 1914 town plat it submitted in response to the *Notice*. Meredith points to newspaper articles it submitted in its comments responding to the *Notice* that refer to activities of Kenansville civic groups as evidence of community interests. Meredith argues that Kenansville's status as a community is enhanced because ranchers and farmers from outlying areas use Kenansville's facilities. Meredith notes that Kenansville does not provide utilities because residents have private wells and septic tanks. Meredith argues that it explicitly attributed each indicia of community status to either Kenansville or Osceola County.[1]

5. In its opposition, Wabash argues that the Chief correctly determined that Kenansville lacked community status, because Meredith was not precise in describing the ties of various facilities and services to Kenansville, Osceola County, or another place. Wabash claims the 1914 Kenansville town plat is not probative of present day Kenansville, arguing that current maps of Kenansville show the town only as the intersection of two roads. Wabash claims that Meredith failed to show that Kenansville was a specific locality with defined boundaries as required by Commission precedent, and also failed to show the existence of a community for a boundary to enclose. Wabash cites to *Oak Beach and Bay Shore, New York*, 57 RR 2d 1275 (1985), in which the Commission determined that a census-designated place with a post office, zip code, community center, and church was not a community. Wabash claims that although Meredith has listed several entities with "Kenansville" in their names, it has failed to show a group of people who would call themselves "Kenansville residents". Finally, Wabash alleges that Meredith is seeking an allotment to Kenansville solely in order to operate a satellite station.

6. In reply, Meredith again cites to *Beacon Broadcasting*, claiming that a petitioner need not show the exact boundaries of a community so long as a geographically identifiable population grouping is shown. Meredith claims that maps of Florida show Kenansville as an identifiable population grouping. Meredith also claims that Wabash erred by analogizing cases involving suburban communities to this case because in each of those cases the community was found not to separately exist from a larger nearby

community. Meredith claims that because Kenansville is not a suburban community, a less stringent test should be applied.

DISCUSSION

7. After full consideration of the pleadings in this case, we grant Meredith's petition for reconsideration. We find that the *R & O* erroneously concluded that Kenansville did not constitute a community, and we now believe that Meredith initially submitted sufficient information to warrant a determination that Kenansville constitutes a community for allotment purposes.

8. If a community is not incorporated or listed in census reports, the proponent for a channel allotment to that locality must show the place to be a geographically identifiable population grouping. *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 101 (1982). While the proponent of the allotment need not show that the borders of the municipality are precisely ascertainable, the proponent must show that residents of the locality are commonly regarded as a distinct group. This can be proven by the "testimony of local residents *or* by objective indications of the existence of a common perception that a locality's populace constitutes a distinct 'geographical population grouping'." *Beacon Broadcasting* at 7562 [emphasis in original]. Examples of objective indications of community status include the existence of political, commercial, social and religious organizations and services in the community.

9. Reexamination of Meredith's evidence establishes the community status of Kenansville under the *Beacon Broadcasting* test. Although not listed in the census reports, Kenansville is listed in the *1990 Rand McNally Commercial Atlas and Marketing Guide* as having a population of 700 persons. A map of the state of Florida in the *Rand McNally Commercial Atlas* indicates Kenansville's location. Kenansville is not a small municipality on the fringe of an urban area and, therefore, the instant proceeding is distinguishable from cases such as *Oak Beach and Bay Shore* in which a petitioner attempts to establish the community status of a municipality on the fringe of an urban area. *See Memorandum Opinion and Order* (*Semora, North Carolina)* (MM Docket No. 84-231), 5 FCC Rcd 934 (1990). Kenansville has its own post office, zip code, telephone exchange, and volunteer fire department. The presence of civic organizations, a community center and a church, all of which have "Kenansville" in their names, indicates that Kenansville residents have a strong belief in the existence of a community. Kenansville supports a combination service station/general store, and the major industries are described as ranching and fishing.[2] Meredith's claim that ranchers and farmers from outlying areas avail themselves of Kenansville's facilities evidences that persons from surrounding areas view Kenansville as a center of activity for the surrounding area, which serves to enhance Kenansville's status as a community. *See id.* When viewed together, these factors become sufficient evidence of the existence of a community.

10. The Commission does not require a municipality to provide every municipal service in order to merit a finding of community status. Therefore, the fact that Osceola County provides police protection, schools, and garbage collection does not inevitably lead to a conclusion that Kenansville is not a community. Similarly, the absence of local government, a newspaper, or a bank is not fatal to Meredith's claim. *Semora, North Carolina*, 5 FCC Rcd at 935.

11. We believe the public interest would be served by the allotment of Television Channel 31 to Kenansville as that community's first local television transmission service. Therefore, we will allot Channel 31 to the community.[3,4]

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 7, 1990,** the Television Table of Allotments, Section 73.606(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Kenansville, Florida	31

13. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Meredith Corporation IS GRANTED.

14. For further information concerning this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Meredith submits an affidavit describing the services attributable to Kenansville and Osceola County, a letter from the postmaster of the Kenansville Post Office confirming that the post office provides service to the area, and excerpts from the area telephone directory confirming Kenansville's separate telephone exchange in order to clarify the evidence. Wabash maintains in its opposition that this material constitutes new evidence, and is therefore untimely and should not be considered. The affidavit, postmaster's letter, and telephone book excerpts largely duplicate the evidence submitted by Meredith in response to the *Notice*. However, we need not consider the newly submitted material in resolving this proceeding.

[2] The Commission has never established a minimum amount of commercial activity to qualify an area as a community. *Semora, North Carolina*, 5 FCC Rcd at 935.

[3] Coordinates for Channel 31 at Kenansville are 27-44-18 and 80-58-14, with a site restriction of 15.4 kilometers (9.6 miles) south to meet the former 60 mile (96.5 kilometers) distance requirement to WMFE-TV, Channel *24-, Orlando. A staff engineering analysis has determined that a site 0.8 kilometer (0.5 mile) closer to Kenansville is permitted in conformity with mileage rounding now included in the kilometer requirements. From this point a facility of 5.9 kilowatts and 800 feet or the equivalent could provide a city grade signal to Kenansville without creating a Grade B contour overlap between the Kenansville

facility and Meredith-owned WOFL-TV, Channel 35. Therefore, Meredith could apply for the Kenansville channel in compliance with the Commission's multiple ownership rules. *See* Commission rule 73.3555.

[4] It is premature to discuss the merits of granting Meredith permission to operate a satellite station at Kenansville. Meredith would bear the burden of proving, at the assignment stage, the need for a satellite facility at Kenansville.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-210

In the Matter of

Amendment of Section 73.202(b),	RM-7153
Table of Allotments,	
FM Broadcast Stations.	
(Glasgow, Kentucky)	

NOTICE OF PROPOSED RULE MAKING

Adopted: March 23, 1990; Released: April 23, 1990

By the Chief, Allocations Branch:

1. WOVO Broadcasting, Inc. (petitioner), licensee of Station WOVO(FM), Channel 288A, Glasgow, Kentucky, has filed a petition for rule making requesting the substitution of Channel 287C3 for Channel 288A at Glasgow, Kentucky, and modification of its license for Station WOVO(FM) to specify Channel 287C3. Petitioner states its intention to apply for the channel, if allotted.

2. In support of its proposal, petitioner states that the substitution of Channel 287C3 for Channel 288A would provide an opportunity for Station WOVO(FM) to increase its coverage and overcome existing shadowing within its service area.

3. Channel 287C3 can be allotted to Glasgow in compliance with the Commission's minimum distance separation requirements with a site restriction 18.9 kilometers (11.8 miles) southeast,[1] in order to avoid a short-spacing to Station WYNG(FM), Channel 287B, Evansville, Indiana.

4. As requested, we shall also propose to modify the license of Station WOVO(FM) to specify operation on Channel 287C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the higher powered channel at Glasgow or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

5. In view of the fact that Glasgow could receive an additional wide coverage area FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Glasgow, Kentucky	236C, 288A	236C, 287C3

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **June 14, 1990,** and reply comments on or before **June 29, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

John M. Barrick, President
WOVO Broadcasting, Inc.
P.O. Box 478
Glasgow, Kentucky 42141

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 287C3 at Glasgow are North Latitude 36-53-33 and West Longitude 85-44-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-211

In the Matter of

Amendment of Section 73.202(b), RM-7178
Table of Allotments,
FM Broadcast Stations.
(Gretna, Marianna, Quincy,
and Tallahassee, Florida)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: March 23, 1990; Released: April 23, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Dolcom Broadcasting, Inc. (petitioner), licensee of Station WTHZ(FM), Channel 276A, Tallahassee, Florida, requesting the substitution of Channel 276C2 for Channel 276A at Tallahassee, Florida, and modification of its license to specify operation on the higher powered channel. The Tallahassee upgrade requires the substitution of Channel 231A for vacant but applied for Channel 227A at Marianna, Florida, for which two applications are pending,[1] substitution of Channel 227A for Channel 264A at Gretna, Florida, and modification of the construction permit (BMPH-870518IF) for Station WGWD(FM), and substitution of Channel 264A for vacant but applied for Channel 274A at Quincy, Florida, for which six applications are pending.[2]

2. Channel 276C2 can be substituted for Channel 276A at Tallahassee's present transmitter site in compliance with the Commission's minimum distance separation requirements with a site restriction 7.4 kilometers (4.6 miles) northeast.[3] In addition, Channel 227A can be substituted for Channel 264A at Gretna in compliance with the minimum distance separation requirements with a site restriction 8.7 kilometers (5.4 miles) southeast.[4] Channel 231A can be substituted for vacant but applied for Channel 227A at Marianna in compliance with the Commission's minimum distance separation requirements with a site restriction 1.2 kilometers (0.8 miles) south,[5] and Channel 264A can be substituted for vacant but applied for Channel 274A at Quincy in compliance with the Commission's minimum distance separation requirements with a site restriction 6.6 kilometers (4.1 miles) southeast.[6]

3. Petitioner submitted information in support of its proposal and stated that the upgrade of its facilities at its existing transmitter site would permit a gain in service area within the station's 1 mV/m contour to a population of 99,968 persons in an area of 6,500 square kilometers and would permit a significant increase in field strength throughout all of this gain area.

4. We are herein issuing a *Show Cause Order* to the permittee of Channel 264A at Gretna, Florida, seeking comments as to why its construction permit (BMPH-870518IF) should not be modified to specify operation on Channel 227A in lieu of Channel 264A. Whenever an existing permittee or licensee is ordered to switch channels in order to accomodate a new allotment, we require the proponent of the new allotment to make a commitment that it will reimburse the permittee or licensee for reasonable and prudent expenses incurred by the change of channels. Petitioner has indicated its willingness to reimburse the permittee at Gretna for its costs in implementing the change in frequency in accordance with Commission policy.

5. As requested, we shall propose to modify the license of Station WTHZ(FM) to specify operation on Channel 276C2. In accordance with Section 1.420(g) of the Commission's Rules we shall not accept other expressions of interest in the proposed channel for Tallahassee. The applicants for Channel 227A at Marianna, Florida, and Channel 274A at Quincy, Florida, will be permitted to amend their applications to specify the new channel without loss of cut-off protection, since no upgrade in the class of channel is proposed. *See Salamanca, NY and Bradford, PA*, 50 FR 26208 (1985) and *Sanibel, Fl.*, 50 FR 32706 (1985).

6. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Gretna, Florida	264A	227A
Marianna, Florida	227A	231A
Quincy, Florida	274A	264A
Tallahassee, Florida	235C, 240A, 255C1, 276A 281C, 291A	235C, 240A, 255C1, 276C2, 281C, 291A

7. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Asset Investments, Inc., permittee of Station WGWD(FM), Channel 264A, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 227A in lieu of Channel 264A.

8. Pursuant to Section 1.87 of the Commission's Rules, Asset Investments, Inc., may, not later than **June 14, 1990,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Asset Investments, Inc. to furnish additional information. If Assets Investments, Inc. raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Asset Investments, Inc., will be deemed to have consented to the modification as proposed in the *Order to Show*

Cause and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

9. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Order* to the following:

Asset Investments, Inc.
P. O. Box 4463
Lynchburg, VA 24502

10. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

11. Interested parties may file comments on or before **June 14, 1990,** and reply comments on or before **June 29, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Irving Gastfreund
Kay, Scholer, Fierman, Hays & Handler
901 15th Street, N.W., Suite 1100
Washington, D.C. 20005

12. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Notice* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the applicants for Channel 227A at Marianna, Florida, and Channel 274A at Quincy, Florida, as follows:

Jackson Radio, Ltd.
P.O. Box 777
Marianna, FL 32446
(BPH-880630MG)

Sheila Ann Adams
314 South Jefferson Street
Marianna, FL 32446
(BPH-880629MJ)

Monte R. Bitner &
Leah R. James
Route 6, Box 586
Quincy, FL 32551
(BPH-870227ME)

Quincy
Communications
R.R. 1, Box 203
Stockton, IA 52769
(BPH-870313NG)

CCI-FM, Ltd.
11675 Darlington Street
Los Angeles, CA 90049
(BPH-870313MO)

Perfect FM Partnership
2121 Seasons Lane
Tallahassee, FL 32304
(BPH-870313NQ)

Quincy Broadcasters,
Inc.
Route 4, Box 1550
Havana, FL 32333
(BPH-870313NY)

Uptown Broadcasting,
Inc.
219 East Virginia Street
Tallahassee, FL 32301
(BPH-870309MD)

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Applicants for Channel 227A at Marianna, Florida, are Jackson Radio Ltd. (BPH-880630MG) and Sheila Ann Adams (BPH-880629MJ).

[2] Applicants for Channel 274A at Quincy, Florida, are Monte R. Bitner and Leah R. James (BPH-870227ME), CCI-FM, Ltd. (BPH-870313MD), Quincy Communications (BPH-870313NG), Perfect FM Partnership (BPH-870313NQ), Quincy Broadcasters, Inc. (BPH-870313NY), and Uptown Broadcasting, Inc. (BPH-870309MD).

[3] The coordinates for Channel 276C2 at Tallahassee are North Latitude 30-29-43 and West Longitude 84-13-51.

[4] The coordinates for Channel 227A at Gretna are North Latitude 30-33-24 and West Longitude 84-36-05.

[5] The coordinates for Channel 231A at Marianna are North Latitude 30-45-47 and West Longitude 85-13-52.

[6] The coordinates for Channel 264A at Quincy are North Latitude 30-32-05 and West Longitude 84-32-37.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-212

In the Matter of

Amendment of Section 73.202(b), RM-7151
Table of Allotments,
FM Broadcast Stations.
(Americus, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 23, 1990; Released: April 23, 1990

By the Chief, Allocations Branch:

1. Guest-Mattox Broadcasting, Inc. (petitioner), licensee of Station WDEC(FM), Channel 232A, Americus, Georgia, has filed a petition for rule making requesting the substitution of Channel 234C3 for Channel 232A at Americus, Georgia, and modification of its license for Station WDEC(FM) to specify the higher powered channel. Petitioner states its intention to apply for the channel, if allotted.

2. Channel 234C3 can be allotted to Americus in compliance with the Commission's minimum distance separation requirements with a site restriction 11.5 kilometers (7.1 miles) southwest,[1] in order to avoid a short-spacing to Station WBYZ(FM), Channel 233C, Baxley, Georgia.

3. As requested, we shall also propose to modify the license of Station WDEC(FM) to specify operation on Channel 234C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the higher powered channel at Americus or require the petitioner to demonstrate the availability of an additional equivalent channel for use by such interested parties.

4. In view of the fact that Americus could receive its first wide coverage area FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Americus, Georgia	232A, 249A	234C3, 249A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 14, 1990,** and reply comments on or before **June 29, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Neal J. Friedman
Pepper & Corazzini
1776 K Street, N.W.
Washington, D.C. 20006
(Attorney for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 234C3 at Americus are North Latitude 31-59-10 and West Longitude 84-18-06.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-213

In the Matter of

Amendment of Section 73.202(b), RM-7083
Table of Allotments,
FM Broadcast Stations.
(Pikeville, Kentucky, and
Matewan, West Virginia)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 23, 1990; Released: April 23, 1990

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by East Kentucky Broadcasting Corporation (petitioner), licensee of Station WDHR(FM), Channel 221A, Pikeville, Kentucky. Petitioner requests the substitution of Channel 294C3 for Channel 221A at Pikeville, Kentucky, and modification of its license to specify the higher class channel. In order to accomplish the upgrade, petitioner suggests the substitution of Channel 221A for Channel 294A at Matewan, West Virginia, and modification of Station WVKM's construction permit.

2. In support of its proposal, petitioner states that Channel 221A is the only Class A channel available for substitution at Matewan, West Virginia, and the proposed upgrade of Station WDHR to Channel 294C3 by substituting its own Channel 221A for Channel 294A at Matewan is an "incompatible channel swap". Petitioner goes on to state that its proposal should be protected from competing expressions of interest consistent with the adjacent channel upgrade provision of Section 1.420(g)(3) of the Commission's Rules. Section 1.420(g)(3) allows the modification of a station's license to a higher class channel if the channel is a co-channel or adjacent channel mutually exclusive with the existing license. The Commission has acknowledged that it will consider analogous proposals involving channel substitutions at other communities which would be necessary to create a mutually exclusive relationship required under Section 1.420(g)(3), and determined to consider these "incompatible channel swaps" on a case-by-case basis. Petitioner also states that if competing expressions of interest are accepted for Channel 294C3 at Pikeville, WDHR's license would be at risk. *See Modification of FM Broadcast License to Higher Class Co-Channel or Adjacent Channels*, 60 RR 2d 114 (1986).

3. Petitioner also states that by upgrading Station WDHR, a predicted 1mV/m or better service would be provided to a population of 182,575 and an area of 4,802.9 square kilometers, which represents an increase of 99,819 (120.6%) in population and 2,863 square kilometers (161%) over its present facilities.

4. Channel 294C3 can be substituted for Channel 221A at Pikeville in compliance with the Commission's minimum distance separation requirements with a site restriction 3.6 kilometers (2.2 miles) south,[1] in order to avoid a short-spacing to the licensed site of Station WKCB(FM), Channel 296A, Hindman, Kentucky. Channel 221A can be substituted for Channel 294A at Matewan, West Virginia, in compliance with the Commission's minimum distance separation requirements at the current construction permit site with a site restriction 1.0 kilometers (0.6 miles) north.[2]

5. We are herein issuing a *Show Cause Order* to Three States Broadcasting Co. Inc., the permittee of Station WVKM(FM) at Matewan, West Virginia, seeking comments as to why its permit should not modified to specify operation on Channel 221A in lieu of Channel 294A. Whenever an existing permittee or licensee is ordered to switch channels in order to accommodate a new allotment, we require the proponent of the new allotment to make a commitment that it will reimburse the permittee or licensee for reasonable and prudent expenses incurred by the change of channels. In comments to the *Notice* petitioner is requested to state its willingness to reimburse Three States Broadcasting Co. Inc., for reasonable costs in changing its channel.

6. In accordance with Commission policy, we shall propose to substitute Channel 294C3 for Channel 221A at Pikeville, Kentucky, and modify the license for Station WDHR(FM) to specify operation on the higher class channel. We shall also propose to substitute Channel 221A for Channel 294A at Matewan, West Virginia, and modify the construction permit for Station WVKM(FM). In accordance with Section 1.420(g)(3) of the Rules, any party expressing an interest in Channel 294C3 at Pikeville should demonstrate why this proposal is not an "incompatible channel swap" such that its expression of interest is foreclosed.

7. In view of the fact that Pikeville could receive a wide coverage area FM service the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Pikeville, Kentucky	221A	294C3
Matewan, West Virginia	294A	221A

8. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Three States Broadcasting Co. Inc., permittee of Station WVKM(FM), Channel 294A, Matewan, West Virginia, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 221A in lieu of Channel 294A.

9. Pursuant to Section 1.87 of the Commission's Rules, Three States Broadcasting Co. Inc., may, not later than **June 14, 1990,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Three States Broadcasting Co. Inc., to furnish additional information. If Three States Broadcasting Co.

Inc., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Three States Broadcasting Co. Inc., will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Notice of Proposed Rule Making and Show Cause Order* to the following: Three States Broadcasting Co. Inc., Radio Hall, P.O. Box 68, Matewan, West Virginia 25678.

11. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

12. Interested parties may file comments on or before **June 14, 1990,** and reply comments on or before **June 29, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Erwin G. Krasnow
Verner, Liipfert, Bernhard,
Mcpherson & Hand
901 15th Street, N.W.
Washington, D.C. 2005-2301
(Attorney for East Kentucky
Broadcasting Corporation)

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or

before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 294C3 at Pikeville are North Latitude 37-27-00 and West Longitude 82-30-00.

[2] The coordinates for Channel 221A at Matewan are North Latitude 37-37-54 and West Longitude 82-09-32.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-157

In re Applications of

BRENDA CHANDLER (hereafter "Chandler") File No. BPH-880706MD

MARY G. DUNNAVANT (hereafter "Dunnavant") File No. BPH-880707ME

For Construction Permit
for a New FM Station
on Channel 268A (101.5 MHz)
in St. Joseph, Tennessee

HEARING DESIGNATION ORDER

Adopted: March 8, 1990; Released: April 23, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Chandler*. Chandler proposes to mount her FM broadcast antenna on the existing tower of WJOR(AM), St. Joseph, MO, and increase the height of this tower in the process. The Commission's Data Base lists the coordinates for the existing AM tower as being 35^0 00' *53*" NL, 87^0 30' *44*" WL. Chandler's application consistently locates this tower structure at coordinates 35^0 00' *52*" NL, 87^0 30' *46*" WL. Because the applicant proposes to locate on an existing tower contained in official Commission records, the discrepancy does not represent either a tenderability or an acceptability defect; consequently, the application was accepted for filing. However, Chandler will be required to submit a clarifying amendment to the presiding Administrative Law Judge. If Chandler's coordinates are correct, she should notify WJOR(AM) of the error so that WJOR(AM) can correct its coordinates with the FCC and the FAA. If the WJOR(AM) coordinates in official Commission records are correct, then Chandler must amend her application to match the WJOR(AM) coordinates. This clarifying amendment must be submitted to the presiding Administrative Law Judge within 30 days after this Order is released.

3. Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Chandler has not completed Item 4 correctly. The Chandler application gives a post office box number as her residence address. Accordingly, Chandler must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge within 30 days after this Order is released.

4. Dunnavant petitioned for leave to amend her application on November 4, 1988. The accompanying amendment was filed after September 29, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That Chandler shall submit an amendment as required by paragraph 2, above, to the presiding Administrative Law Judge within 30 days after the release of this Order.

9. IT IS FURTHER ORDERED, That Chandler shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

10. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Dunnavant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance

stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-34

In the Matter of

Amendment of Section 73.202(b),	RM-6086
Table of Allotments,	RM-6335
FM Broadcast Stations.	
(Llano and Kerrville, Texas)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 14, 1990; Released: April 24, 1990

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration filed by Maxagrid Inc. ("Maxagrid")[1], licensee of Station KLKM-FM, Llano, Texas, directed against the *Report and Order*, 54 FR 47363, November 14, 1989, which allotted Channel 232C2 to Kerrville, Texas, and Channel 284C2 to Llano, Texas. The *Report and Order* substituted Channel 232C2 for Channel 232A at Kerrville, modified the license of Griffin Broadcasting Corporation ("Griffin") for Station KRVL(FM) at Kerrville, substituted Channel 284C2 for Channel 285A at Llano, and modified Maxagrid's license for Station KLKM-FM accordingly. Specifically Maxagrid seeks reconsideration of the substitution of Channel 284C2 in lieu of Channel 285C2 at Llano. Griffin filed an opposition to the petition for reconsideration, to which Maxagrid filed a reply.

BACKGROUND

2. The Commission issued the *Notice of Proposed Rule Making*, 3 FCC Rcd 648 (1988), proposing the substitution of Channel 231C2 for Channel 285A at Llano, and the modification of Station KLKM-FM's license to specify operation on the higher class channel at the request of Maxagrid.[2] In response to the *Notice* Griffin [3] filed a counterproposal seeking to substitute Channel 232C2 for Channel 232A at Kerrville, and to modify Station KRVL(FM)'s license to specify operation on the higher class co-channel. In order to permit both communities to receive an expanded FM service, Channel 284C2 was identified as an alternate allotment at Llano to resolve the conflict. Accordingly, in the *Report and Order*, adopted October 12, 1989, we upgraded Station KRVL(FM) on Channel 232C2 and Station KLKM-FM on Channel 284C2. On October 6, 1989, three business days before the *Report and Order* was adopted, Maxagrid filed a further pleading. The *Report and Order* did not acknowledge or discuss that pleading.

3. On reconsideration Maxagrid argues that its filing, entitled "Motion to Accept Further Comments and The Further Comments" should have been considered and discussed in the *Report and Order*. In those further comments, Maxagrid suggested that Channel 285C2 in lieu of Channel 284C2 be considered at Llano since the co-channel upgrade could be accomplished at Station KLKM-FM's current transmitter site. Maxagrid alleged that it was precluded from requesting Channel 285C2 initially because of a short spacing to the former operation of Station KPLE(FM), at Temple, Texas, on Channel 285A.[4] Maxagrid claims that the new development at Temple, freeing Channel 285 for consideration at Llano, was presented at the earliest possible opportunity. Maxagrid further argues that the use of Channel 285C2 at Llano provided the best resolution for this proceeding. Maxagrid objects to being upgraded on a different channel than requested and to relocating its transmitter site.

4. Griffin argues that there are serious procedural and substantive flaws in Maxagrid's petition for reconsideration and urges its dismissal or denial. Griffin contends that Maxagrid's petition failed to comply with Section 1.429(b) since the facts relied on do not relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the Commission. Griffin argues that the facts pertaining to the changes at Temple were available to Maxagrid on May 2, 1988, the initial comment date in this proceeding and Maxagrid delayed until October 6, 1989, before setting forth the possible resolution. Griffin urges the Commission to reject Maxagrid's petition for reconsideration.

5. Maxagrid, in respond to the opposition, continues to argue that Channel 285C2 was not available for allotment at Llano until Station KPLE(FM) at Temple petitioned to substitute Channel 282C2 for Channel 285A at Temple and the changes occurred to the FM Table of Allotments.

6. After carefully considering all the information before us, we deny the petition for reconsideration. We find no public interest justification to warrant consideration of the late-filed comments by Maxagrid. First, the *Notice* established April 4, 1988, and April 19, 1988, for comment periods, and thereafter the counterproposal public notice of April 15, 1988 (Report No. 1724), provided an additional reply comment period until May 2, 1988. Therefore, Maxagrid's attempt to file additional comments approximately 17 months after the close of the established comment period violates Section 1.415(d) of the Commission's Rules. Second, Maxagrid had previously indicated a willingness to relocate its transmitter site approximately 21 kilometers from the city reference coordinates to accomplish a non-adjacent channel upgrade. Third, Maxagrid's new proposal to retain its current transmitter site for the upgrade of its station furthers private, but no public interests. *See Freedom and Morgan Hill, California*, 26 RR 2d 1057 (1987) and *Rockport, Texas*, 4 FCC Rcd 8075 (1989). Grant of its request would require us to rescind the allotment of Channel 285C3 to Dublin, Texas, as a first local service. *See Report and Order* in MM Docket No. 89-128, DA 90-221 (released February 23, 1990).

7. Based on the above discussion, IT IS ORDERED, That the Petition for Reconsideration filed by Maxagrid, Inc., IS DENIED.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Patricia Rawlings, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Maxagrid is also known as Maxagrid Broadcasting Corporation.

[2] Formerly KLKM Radio.

[3] Formerly Stiles Communications Corp.

[4] Effective June 13, 1988, the FM Table of Allotments was amended to reflect Channel 282C2 at Temple, Texas, in lieu of Channel 285A. *See Brenham, Round Rock, Austin, Texas, et al,* 3 FCC Rcd 2495 (1988). The Temple proposal was originally announced by Public Notice on February 6, 1987, Report No. 1642.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-7

Amendment of Section 73.202(b),	RM-6573
Table of Allotments,	RM-6603
FM Broadcast Stations	
(Kimberly City, Seligman,	
and Cassville, Missouri)	

ERRATUM

Released: April 24, 1990

By the Deputy Chief, Policy and Rules Division:

1. On March 22, 1990, the Commission released the *Report and Order*, DA 90-385, in the above captioned proceeding. In the *Order*, at paragraph 8, Station KJEM-FM, Seligman, Missouri, is modified to Channel 240C2. The channel was incorrect. Paragraph 8 is hereby corrected to show Station KJEM-FM, Seligman, Missouri, modified to Channel 227C2.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-395

In the Matter of

Amendment of Section 73.202(b), RM-6780
Table of Allotments,
FM Broadcast Stations.
(Kailua-Kona, Hawaii)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 23, 1990; Released: April 24, 1990

By the Chief, Allocations Branch:

1. At the request of Sirius Communications, Inc., ("Sirius"), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 6916 (1989), proposing the substitution of Channel 230C for Channel 229C1 at Kailua-Kona, Hawaii, and modification of its construction permit to specify operation on the higher class channel. Petitioner filed comments restating its intention to apply for the channel, if allotted. Henry Hawaii Broadcasting, Inc. ("Henry"), licensee of Station KIKI(FM), Channel 230C1, Honolulu, Hawaii, filed opposing comments. Sirius filed reply comments.

2. Henry, in its comments, opposes the substitution of Channel 230C for Channel 229C1. Henry states that Station KIKI(FM) presently operates on Channel 230C1. While both KIKI and KLUA could operate on 230C1 and 230C in compliance with the Commission's mileage separation requirements, Henry alleges that granting Sirius use of Channel 230C would cause objectionable co-channel interference. Henry concedes, however, that the proposal is consistent with the Commission's distance separation rules.

3. Sirius, in reply comments, states that its proposal meets the Commission's spacing requirements. Sirius contends that Henry's only objection is that some of his fringe area listenership on the Island of Maui will be lost if Channel 230C is allotted to Kailua-Kona. Sirius states that protection of fringe area listenership is not within the purview of the Commission's rules and can be given no decisional weight in this case. Sirius also states that it may add new fringe listenership of its own in portions of Maui wich are currently terrain shielded from Station KIKI(FM). Sirius notes that the Engineering Statement submitted with Henry's opposition is the same statement used to oppose KLUA's previous proposal to substitute Channel 230C1 for Channel 228A at Kailua-Kona. Nothing new has been added to the showing and indeed the showing does not directly address the issue currently at hand.

4. Based on the information before us, we believe the public interest would benefit from the substitution of Channel 230C for Channel 229C1 at Kailua-Kona. We find that the issues raised by Henry concerning "objectionable co-channel interference" are without merit. Section 73.209 of the rules states that permittees and licensees of FM broadcast stations are protected from interference solely to the extent specified in the distance separation requirements and the rules governing maximum power and antenna heights. Station KIKI(FM) is not entitled to any interference protection beyond that provided for by Section 73.209 of the Commission's rules, since the allotment of Channel 230C at Kailua-Kona meets the spacing requirements of the Commission's rules.

5. Channel 230C can be allotted to Kailua-Kona in compliance with the minimum distance separation requirements of the Commission's rules.[1] As proposed, we will also modify the construction permit for Station KLUA(FM) to specify operation on the higher class channel.

6. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 8, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Kailua-Kona, Hawaii	230C

7. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit for Station KLUA(FM), Kailua-Kona, Hawaii, IS MODIFIED, to specify operation on Channel 230C in lieu of Channel 229C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 230C are North Latitude 19-38-24 and West Longitude 155-59-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-369

In the Matter of

Amendment of Section 73.202(b),	RM-6282
Table of Allotments,	RM-6453
FM Broadcast Stations.	RM-6580
(Mt. Morris and Savanna, Illinois;	
Belle Plaine, Maquoketa, Webster	
City and Winterset, Iowa)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: March 27, 1990; Released: April 24, 1990

By the Chief, Policy and Rules Division:

1. The Commission has before it a petition for reconsideration filed by Maquoketa Broadcasting Company ("Maquoketa"), licensee of KMAQ(FM), Channel 237A, Maquoketa, Iowa, of the *Report and Order* in this proceeding, 4 FCC Rcd 5485 (1989). Gorich Radio Corporation ("Gorich"), licensee of Station KQWC-FM, Channel 240A, Webster City, Iowa, and Carroll County Communications, Inc. ("Carroll"), licensee of Station WCCI(FM), Channel 261A, Savanna, Illinois, filed oppositions to Maquoketa's petition for reconsideration.

2. The *R & O* substituted Channel 262B1 for Channel 261A at Savanna, modified the license of Station WCCI(FM) accordingly, and substituted Channel 239A for Channel 263A at Mt. Morris, Illinois, to accommodate the Savanna substitution, as requested by Carroll. In addition, the *R & O* substituted Channel 239C2 for Channel 240A at Webster City and modified the license of Station KQWC-FM accordingly, as requested by Gorich. To accommodate the Webster City substitution, the *R & O* substituted Channel 238A for Channel 239A at Belle Plaine, Iowa, and Channel 258A for Channel 239A at Winterset, Iowa. However, the *R & O* denied Maquoketa's counterproposal to substitute Channel 238C2 for Channel 237A at Maquoketa and to modify the license of Station KMAQ(FM) accordingly. Maquoketa's counterproposal was mutually exclusive with the Mt. Morris and Belle Plaine substitutions. Maquoketa had suggested that the three proposals could be accommodated if the reference point for Channel 239A at Mt. Morris was moved 5 kilometers (3.1 miles) east of its present site or of city reference coordinates, and if the transmitter site for the Webster City substitution was moved 20.1 kilometers (12.5 miles) northwest of Webster City, thereby removing the need for the Belle Plaine substitution. The *R & O* rejected Maquoketa's suggestion, noting that Mason Broadcasting Company ("Mason"), the permittee[1] for the Mt. Morris channel, would have to relocate its transmitter site following a channel substitution at that community. The *R & O* cited *North Charleston, South Carolina*, 51 RR 2d 25 (1982), for the proposition that Commission policy is not to require a station to involuntarily relocate its transmitter site, and noted that Maquoketa failed to provide the Commission with Mason's consent to relocate its transmitter and failed to state an intention to reimburse Mason for the cost of the change.

3. In its petition for reconsideration, Maquoketa argues that the Commission erred in not adopting its suggestion to relocate the Mt. Morris reference point in order to accommodate its proposal.[2] Maquoketa argues that the *R&O* failed to consider that Mason filed an application for the assignment of the Mt. Morris construction permit to Mt. Morris Radio Group, Inc. [3] Maquoketa argues that Mason apparently had not begun construction because it requested payment only of legal expenses incurred in obtaining the permit. Maquoketa claims that in November 1988 its counsel contacted counsel for Mt. Morris Radio Group to seek consent for the relocation of the Mt. Morris site. Maquoketa claims that the counsel indicated that Mt. Morris Radio Group would file a site change application after approval of the assignment application and that the new site would be in accordance with the desires of Maquoketa, but that counsel could not commit Mt. Morris Radio Group to any understanding with Maquoketa before approval of the assignment application. Therefore, Maquoketa argues, it was unable to obtain consent from either the permittee or the proposed assignee for the relocation of the Mt. Morris transmitter site. Maquoketa states its continuing willingness to reimburse the permittee for the Mt. Morris channel for its reasonable costs in changing its transmitter site to accommodate the Maquoketa substitution.

4. Gorich and Carroll oppose the petition for reconsideration. Gorich and Carroll argue that Maquoketa's failure to provide the Commission with assurance that the Mt. Morris permittee was willing to relocate its transmitter site, as well as an assurance that it would reimburse the permittee for reasonable costs associated with relocation, rendered Maquoketa's proposal defective.[4] Gorich argues that Maquoketa's allegation that no costs would accrue from the relocation is spurious because a permittee would face various costs from a transmitter site relocation regardless of whether or not the facility had been built. Carroll argues that Maquoketa's statement of its intention to reimburse the Mt. Morris permittee should be rejected as grossly untimely. Gorich claims that the existence of an assignment application has no bearing on the Commission's policy of not requiring a permittee or licensee to involuntarily change its transmitter site. Gorich and Carroll argue that Maquoketa could have informed the Commission of its November 1988 conversation with Mt. Morris Radio Group, and of its intention to reimburse the permittee of the station, during the reply comment period following release of the *Notice of Proposed Rule Making* in this proceeding, 3 FCC Rcd 4650 (1988). Finally, Gorich notes that Maquoketa fails to provide declarations from counsel of Mason or Mt. Morris Radio Group substantiating their discussions.

5. After careful consideration of the pleadings filed in this proceeding, we deny Maquoketa's petition for reconsideration. Commission rule 1.429(b) states that a petition for reconsideration which relies on facts which have not previously been presented to the Commission will be granted only if the facts relied upon relate to events which have occurred or circumstances which have changed since the last opportunity to present them to the

Commission. Maquoketa alleges that its counsel attempted to obtain consent for a site relocation of the Mt. Morris station in November, 1988, yet offered no explanation of its efforts in any of its pleadings filed in response to the *Notice*. Maquoketa offers no explanation in its petition for reconsideration of its failure to inform the Commission of its attempts to obtain consent. Furthermore, Maquoketa offers no explanation of its failure to timely provide the Commission with a declaration of its willingness to reimburse the Mt. Morris permittee for costs associated with a site change. In any event, we do not believe it would serve the public interest to further consider Maquoketa's petition for reconsideration. Even if Maquoketa had submitted a statement of intent to reimburse the Mt. Morris permittee, and even if Maquoketa had explained its attempts to obtain consent in response to the *Notice*, the fact remains that it has yet to obtain consent from the present permittee of the channel. Accordingly, we see no reason why we should depart from the Commission's policy of refusing to entertain a proposal requiring a station to change its transmitter site absent consent from the permittee or licensee. *See Waupun, Mayville and New Holstein, Wisconsin*, 3 FCC Rcd 3163 (1988), *North Charleston, South Carolina, supra*.

6. Accordingly, Maquoketa Broadcasting Company's petition for reconsideration IS DENIED.

7. For further information regarding this proceeding, contact Michael Ruger, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] File No. BPH-870819NE.

[2] Initially, Maquoketa argued in its petition for reconsideration that Mason's construction permit expired on July 28, 1989, and that Commission records did not reveal that Mason filed an application for license or an application for extension of completion date. Claiming that the expiration of the construction permit constituted a change in core circumstances justifying reconsideration, Maquoketa argued that denial of its proposal on the grounds that the Mt. Morris substitution would require a change in an existing site with attendant costs was contrary to the facts and, therefore, arbitrary and capricious. On August 22, 1989, Maquoketa filed a supplement to its petition noting that Mason filed a timely application for extension of completion date, but that the filing was not a matter of public notice when Maquoketa submitted its petition for reconsideration. Because Mason continues to hold a valid construction permit for the Mt. Morris channel, Maquoketa's claims based on the alleged expiration of Mason's construction permit are moot and will not be considered herein.

[3] File No. BAPH-881028HC.

[4] Gorich and Carroll cite to *Waupun, Mayville and New Holstein, Wisconsin*, 3 FCC Rcd 3163 (1988), *Brookville and Punxsutawney, Pennsylvania*, 3 FCC Rcd 5555 (1988), *FM Channel Assignments*, 62 RR 2d 1168 (1987), *North Charleston, South Carolina, supra, Woodward and Alva, Oklahoma*, 48 RR 2d 1537 (1981), and *Columbia, Jamestown and Smiths Grove, Kentucky*, 48 RR 2d 1195 (1981), in support of this proposition.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-214

In the Matter of

Amendment of Section 73.202(b),	RM-7101
Table of Allotments,	RM-7226
FM Broadcast Stations.	
(Homerville, Lakeland and	
Statenville, Georgia)	

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: March 23, 1990; Released: April 24, 1990

By the Chief, Allocations Branch:

1. The Commission has before it two conflicting petitions for rule making. The first petition, filed by Lakeland Broadcasters, Inc. ("Lakeland"), permittee of Station WHFE(FM), Channel 290A at Lakeland, Georgia, requests the substitution of Channel 290C3 for Channel 290A and the modification of its construction permit (BPH-870910NV) to specify the higher class channel. In addition, Lakeland suggests the substitution of Channel 254A for Channel 288A at Homerville, Georgia, and the modification of Station WBTY(FM)'s license to specify operation on Channel 254A, in order to permit the upgrade at Lakeland. The second petition, filed by LaTaurus Production Incorporated ("LaTaurus"), requests the allotment of Channel 254A to Statenville, Georgia, as that community's first local service. The proposals conflict due the proposed use of Channel 254A at either Homerville or Statenville. Lakeland and LaTaurus each state an intention to apply for the requested channel, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission fairly, equitably, and efficiently distribute frequencies "among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to satisfy its status. Statenville is not listed in the U.S. Census or incorporated.[1] Therefore, LaTaurus should present the Commission with sufficient information to demonstrate that Statenville is incorporated, or that it has social, economic or cultura indicia to qualify it as a "community" for allotment purposes. *See Ansley, Alabama*, 46 FR 58688 (1981); *Cascade Village, Colorado*, 48 FR 19917 (1983); *Ellwood, California*, 50 FR 13031 (1985). In addition, parties should address the applicability, if any, of the Commission's "quiet village" doctrine.

3. Channel 290C3 can be substituted for Channel 290A at Lakeland, Georgia, in compliance with the Commission's minimum distance separation requirements with a site restriction 1.3 kilometers (0.8 miles) west,[2] if the channel substitution is made at Homerville. Channel 254A can be substituted for Channel 288A at Homerville, Georgia, in compliance with the Commission's minimum distance separation requirements with a site restriction 11.0 kilometers (6.9 miles) west at Station WBTY's licensed site. [3] Channel 254A can be allotted to Statenville in compliance with the minimum distance separation requirements with a site restriction 12.9 kilometers (8.0 miles) northeast.[4] The allotment of Channel 254A at Statenville, Georgia, will be contingent on Station WQHL(FM), Live Oak, Florida, being licensed on Channel 251C2.

4. We are herein issuing a *Show Cause Order* to Southern Broadcasting & Investment, licensee of Station WBTY(FM), Channel 288A, Homerville, Georgia, seeking comments as to why its license should not be modified to specify operation on Channel 254A in lieu of Channel 288A. Commission policy requires that Station WBTY be reimbursed for the reasonable costs of changing frequencies. Lakeland states its willingness to reimburse Station WBTY(FM) for its reasonable costs incurred in changing frequencies.

5. We believe the public interest would be served by seeking further comments on the allotment of Channel 254A to Statenville, Georgia, as the community's first local service or the upgrading of Station WHFE(FM) from Channel 290A to Channel 290C3. In this regard, we providing the proponents with an opportunity to demonstrate why their respective proposals should be preferred. The parties should be guided by the criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). We note that the Statenville proposal is seeking a first local service, while the Lakeland proposal seeks to upgrade an existing facility. We also note that a first local service is generally preferred over an upgrade to an existing station.

6. As requested, we shall propose to modify the construction permit for Station WHFE(FM) at Lakeland to specify operation on Channel 290C3. In accordance with Section 1.420(g) of the rules, we shall not accept competing expressions of interest in use of the channel at Lakeland or require the proponent to demonstrate the availability of an additional equivalent channel for use by other interested parties.

7. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Homerville, Georgia	288A	254A
Lakeland, Georgia	290A	290C3
	OR	
Statenville, Georgia	--	254A

8. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Southern Broadcasting & Investment, licensee of Station WBTY(FM), Channel 288A, Homerville, Georgia, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 254A in lieu of Channel 288A.

9. Pursuant to Section 1.87 of the Commission's Rules, Southern Broadcasting & Investment, may, not later than **June 15, 1990,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on Southern Broadcasting & Investment, to furnish additional information. If Southern Broadcasting & Investment, raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Southern Broadcasting & Investment, will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

10. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Notice of Proposed Rule Making and Show Cause Order* to the following: Southern Broadcasting & Investment, P.O. Box 577, Homerville, Georgia 31634.

11. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

12. Interested parties may file comments on or before **June 15, 1990,** and reply comments on or before **July 2, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioners, or their counsel or consultant, as follows:

Dennis P. Corbett
Laura B. Humphries
Leventhal, Senter & Lerman
2000 K Street, N.W., Suite 600
Washington, D.C. 20006
(Attorneys for Lakeland Broadcasters, Inc.)

Warren Lee, President
LaTaurus Production Inc.
1103 West Magnolia Street
Valdosta, Georgia 31601

13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Karl A. Kensinger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We note that Statenville is listed in the 1988 Edition of the Rand McNally Commerical Atlas, with a population of 650 persons. However, mere geographical location is not sufficient to establish "community" status. *See, Vimville, Mississippi,* 48 FR 5974 (1983).

[2] The coordinates for Channel 290C3 at Lakeland are North Latitude 31-02-25 and West Longitude 83-05-00.

[3] The coordinates for Channel 254A at Homerville are North Latitude 31-02-04 and West Longitude 82-51-50.

[4] The coordinates for Channel 254A at Statenville are North Latitude 30-47-05 and West Longitude 82-55-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-152

In re Applications of

Kentucky State University (hereafter "KSU")	File No. BPED-880302ML
Kentucky FM Broadcast Limited Partnership (hereafter "KBLP")	File No. BPH-880303MD
Allan Communications, Incorporated (hereafter "Allan")	File No. BPH-880303ME
David R. Roederer (hereafter "Roederer")	File No. BPH-880303MF
S. A. Y. Radio, Inc. (hereafter "SAY")	File No. BPH-880303MI

For Construction Permit for
a New FM Station in
Frankfort, Kentucky Channel 279A
(103.7 MHz)

HEARING DESIGNATION ORDER

Adopted: March 6, 1990; Released: April 24, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *KBLP*. KBLP states that it is a limited partnership and certifies that no limited partner will be involved in any material respect in the management or operation of the proposed station. However, in response to Section II, Item 4, FCC Form 301 (October 1986), KBLP states that Marta Ferguson is the general partner and that she has 22% of the vote. These answers raise questions about KBLP's ownership structure. If Ferguson is the sole general partner, she must have 100% of the vote. If she is not, then the remaining general partners, their shares of the vote, and their media interests must be provided. Accordingly, within 30 days of the release of this Order, KBLP will be required to file a clarifying amendment with the presiding Administrative Law Judge.

3. *Roederer*. Roederer is Director of Marketing for Station WKYT-TV, Lexington, Kentucky. He has indicated his intent to terminate his relationship with WKYT-TV in the event of grant of the referenced application. Accordingly, in the event of grant of Roederer's application, he will be required to sever all connections with Station WKYT-TV prior to the commencement of program test authority.

4. On January 4, 1989, SAY petitioned for reconsideration of the acceptance for filing of Roederer's application, and requested its dismissal. SAY's petition will be denied. At the outset, a careful review of Roederer's contour map indicates that the community of license is indicated by a star labeled "Frankfort." Moreover, Roederer's transmitter site map, Exhibit No. 7 of the application, clearly confirms that the transmitter is located across Benson Creek, immediately north and west of Frankfort. Accordingly, Roederer's application complies with the tender requirements of Appendix D of the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985). *See Letter to Jerrold Miller, Esq. from Larry D. Eads, Chief, Audio Services Division* (8920-GDG), dated May 3, 1988 (Ravena, New York). With respect to FAA notification by the applicant an air hazard issue will be specified below. We also find that Roederer's commitment in Exhibit No. 6 of the application to assume "full responsibility for the elimination of any objectionable interference" is adequate to address SAY's concerns. Lastly, our review indicates that Roederer's determination of antenna height above average terrain was calculated in accordance with applicable Commission rules.

5. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Roederer would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. *SAY*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Say has filed such statement, it is deficient. SAY has not listed any recognizable recruitment sources for women. Accordingly, SAY will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

7. *Other matters*. The following applicants petitioned for leave to amend their applications. The accompanying amendments were filed after June 6, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

Applicant	Amendment Filing Date
KBLP	June 27, 1988, and August 23, 1988
Allan	December 15, 1988

8. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the Roederer would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, KBLP shall submit an amendment to the presiding Administrative Law Judge clarifying its ownership structure.

12. IT IS FURTHER ORDERED, That, in the event of grant of Roederer's application, Roederer will be ordered to divest himself of all interests in and sever all connections with Station WKYT-TV, Lexington, Kentucky, prior to the commencement of program test authority.

13. IT IS FURTHER ORDERED, That, SAY's Petition for Reconsideration of Acceptance for Filing of Roederer's application IS DENIED.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, SAY shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

16. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by KBLP, and Allan ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

18. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

19. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-181

In re Applications of

FAYE M. BRENNAN (hereafter "Brennan") — File No. BPH-870818MC

BARRY SKIDELSKY (hereafter "Skidelsky") — File No. BPH-870819MO

BRADMARK BROADCASTING COMPANY (hereafter "Bradmark") — File No. BPH-870819MT

ARIES BROADCASTING CORPORATION (hereafter "Aries") — File No. BPH-870819MZ

NEW YORK BROADCASTING CORPORATION (hereafter "New York") — File No. BPH-870819NC

NORMANDY BROADCASTING CORPORATION (hereafter "Normandy") — File No. BPH-870819NK

For Construction Permit
for a New FM Station on Channel 289B1
in Queensbury, New York

HEARING DESIGNATION ORDER

Adopted: March 15, 1990; Released: April 24, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. In the *Notice of Proposed Rule Making* in Docket No. 86-331, 51 Fed. Reg. 29576 (August 19, 1986), the Commission, at the request of Jedco Broadcasting Corporation ("Jedco"), licensee of Station WSCG(FM), Corinth, New York, proposed the substitution of Channel 289B1 for Channel 228A at Corinth, New York, and the modification of Station WSCG(FM)'s license accordingly. In response to the *Notice*, Bradmark Broadcasting Company ("Bradmark"), licensee of Station WENU(FM), Hudson Falls, New York, filed a counterproposal requesting the allocation of Channel 289B1 to Queensbury, New York, as the community's first local FM service.[1] In the *Report and Order* in MM Docket 86-331, 2 FCC Rcd 3316 (1987), the Commission granted Bradmark's counterproposal. Jedco then filed a petition for reconsideration, which was dismissed by the Commission in the *Memorandum Opinion and Order* in MM Docket 86-331, 4 FCC Rcd 5709 (1989). Hastings Broadcasting Corporation ("Hastings") acquired the license of Station WSCG(FM) on January 11, 1989, pursuant to the December 1, 1988 grant of the assignment application (BALH-881004GJ). On August 25, 1989, Hastings filed an application for review of the dismissal of Jedco's petition for reconsideration, which is presently pending. Accordingly, while the applicants for the Queensbury allocation will be allowed to proceed to comparative hearing, it shall be ordered that any construction permit awarded as a result of this proceeding shall be made contingent on the final disposition of Hastings' application for review in MM Docket No. 86-331.

3. *Skidelsky*. In response to Item 19, Section V-B of FCC Form 301, Skidelsky has entered the value 36.8 km as being the distance to the 1 mV/m contour, for the 0^0 radial. However, the actual value for this distance is 45.2 km, as correctly plotted on the contour map. This discrepancy does not affect the acceptability of Skidelsky's application since the use of either value would not render the application unacceptable for filing. Accordingly, Skidelsy will be required to amend its figure for the 0^0 radial in Item 10, Section V-B of FCC Form 301 within 30 days fo the release of this Order.

4. The engineering data submitted by New York does not clearly demonstrate that it provides a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). Engineering study reveals that New York's 3.16 mV/m contour would cover approximately 66% of the community of license. New York has requested a waiver of Section 73.315(a) stating that its 66% coverage of Queensbury with a 3.16 mV/m signal "is believed to represent substantial compliance" with the rule. Additionally, New York notes that the city coverage shortfall is inevitable if spacing requirements are to be met, and the specified site is the only one obtainable by the applicant which complies with the spacing rules. However, city coverage of 80% or greater was demonstrated by five of the six applicants in this proceeding. Furthermore, the *Memorandum Opinion and Order* in MM Docket No. 88-331, 4 FCC Rcd 5709 (1989), specified (in paragraph 9) that the site restriction on the Queensbury allocation had been removed and that Queensbury applicants could amend to specify new sites to comply with the city coverage rule. Accordingly, New York's waiver request will be denied, and an issue will be specified.

5. Bradmark is the licensee of Station WENU(FM) in Hudson Falls, New York. Hudson Falls is close enough to Queensbury that Bradmark's ownership of WENU(FM) and the facility proposed here would violate the Commission's multiple ownership rules, 47 C.F. R. § 73.3555(a). Bradmark has indicated its intent to terminate its relationship with Station WENU(FM) in the event of grant of the

referenced application. Accordingly, in the event of grant of Bradmark's application, Bradmark will be required to sever all connections with Station WENU(FM), Hudson Falls, New York prior to the commencement of program test authority.

6. Normandy is the licensee of Station WYLR(FM) in Glens Falls, New York. Glens Falls is close enough to Queensbury that Normandy's ownership of WYLR(FM) and the facility proposed here would violate the Commission's multiple ownership rules, 47 C.F.R. § 73.3555. Normandy has indicated its intent to terminate its relationship with Station WYLR(FM) in the event of grant of the referenced application. Accordingly, in the event of grant of Normandy's application, Normandy will be required to sever all connections with Station WYLR(FM), Glens Falls, New York prior to the commencement of program test authority.

7. *Late - Filed Amendment / Normandy*. On October 13, 1987, Normandy filed an amendment to Section V-B (engineering data) to its application. Pursuant to 47 C.F.R. § 73.3522(a) all amendments filed outside the specified periods for amendments as of right and prior to designation for hearing must be accompanied by a showing of good cause, or filed pursuant to 47 C.F.R. §§ 1.65 or 73.3514. Unauthorized or untimely amendments are subject to return by the Commission's staff without consideration. Normandy's October 13, 1987 amendment was submitted after October 10, 1987, the last date for filing amendments as of right and is therefore untimely. Furthermore, Normandy's amendment was not accompanied by a showing of good cause,[2] and would not ordinarily be considered under §§ 1.65 or 73.3514. However, the *Memorandum Opinion and Order* in MM Docket 86-331, *supra*, provided an opportunity for all Queensbury applicants to file site change amendments to gain compliance with city coverage rule. Therefore, while Normandy provided no good cause for its October 13 amendment, the Commission later invited Queensbury applicants to file exactly that type of amendment. Accordingly, for administrative convenience, Normandy's amendment will be accepted below. However, Normandy will be accorded no comparative advantage from this amendment.

8. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Skidelsky	May 19, 1988; July 22, 1988; December 12, 1988; April 28, 1989; September 29, 1989
Aries	March 30, 1989
Normandy	October 13, 1987

9. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch, New York and Normandy have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by New York and Normandy would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

10. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

11. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

12. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether the proposal of New York would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's Rules, and, if not, whether circumstances exist which warrant waiver of that Section.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by New York and Normandy would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

13. IT IS FURTHER ORDERED, That in accordance with paragraph 2 hereinabove, any construction permit awarded as a result of this proceeding shall be contingent on the dispositon of the application for review in MM Docket No. 86-331, filed on August 25, 1989 by Hastings Broadcasting Corporation.

14. IT IS FURTHER ORDERED, That in accordance with paragraph 3 hereinabove, Skidelsky shall submit an amendment to Item 10, Section V-B of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

15. IT IS FURTHER ORDERED, That, in the event of grant of Bradmark's application, Bradmark will be ordered to divest itself of all interests in and sever all connections with Stations WENU(FM), Hudson Falls, New York prior to the commencement of program test authority.

16. IT IS FURTHER ORDERED, That, in the event of grant of Normandy's application, Normandy will be ordered to divest itself of all interests in and sever all connections with Stations WYLR(FM), Glens Falls, New York prior to the commencement of program test authority.

17. IT IS FURTHER ORDERED, That Normandy's October 13, 1987 amendment IS ACCEPTED to the extent indicated herein.

18. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Skidelsky, Aries and Normandy ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

19. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

20. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

21. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

22. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Public notice of the filing of the counterproposal was given on October 14, 1986.

[2] Normandy filed the amendment simply because it found a site with better city coverage of Queensbury.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-153

In re Applications of

ALPHA & OMEGA EDUCATIONAL BROADCAST FOUNDATION, INC. (hereafter "Broadcast")	File No. BPED-880126MA
SOUND BROADCASTING CO. (hereafter "Sound")	File No. BPH-880126ML
DEL RAYCEE (hereafter "Raycee")	File No. BPH-880126MW
LEVERTY PARTNERSHIP (hereafter "Leverty")	File No. BPH-880126NA
RADIO SOUTH BURLINGTON, INC. (hereafter "Radio")	File No. BPH-880126NF
MARGARET O. PESCATELLO (hereafter "Pescatello")	File No. BPH-880126OE

For Construction Permit for a
New FM Station on Channel 254A
(98.7 MHz) in East Lyme, Connecticut

HEARING DESIGNATION ORDER

Adopted: March 6, 1990; Released: April 24, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* An engineering study reveals a discrepancy in the reported boundaries of East Lyme, Connecticut. Five of the six applicants have requested a waiver of 47 C.F.R. § 73.315(a), three of which specified coverage of East Lyme Township. Leverty and Radio assumed the channel is allocated to the Village of East Lyme, which does not require a waiver. Sound claims coverage of 84.29% of the Town of East Lyme, deemed substantial compliance with § 73.315(a). Broadcast, Raycee and Pescatello, specifying less than 80% coverage of the township of East Lyme, have requested a waiver of § 73.315(a).

3. The Commission has not found the political boundary of a "town," as that term is applied to the New England States, to be relevant to the issue of regulatory compliance respecting city-grade coverage. Rather, the Commission has held that the community to be served, in such states, consists of the "urban portions of the town." *See Berkshire Broadcasting South, Inc.*, Hearing Designation Order in MM Docket No. 87-161, 2 FCC Rcd 3226 (1987).

4. We are satisfied that each of the above applications satisfies the city-grade coverage requirement with regard to the Village of East Lyme, which we find synonymous with the urban portion of East Lyme for purposes of determining the community to be served by the instant allocation. Consequently, waiver under 47 C.F.R. § 73.315(a) is unnecessary. Accordingly, the waiver requests by Broadcast, Raycee and Pescatello will be dismissed as moot.

5. *Sound.* Section II, Item 4 of FCC Form 301 (October 1986) requires that an applicant specify its address (number, street, city, state) as well as the home address of each of its principals. Applicant has not completed Item 4 correctly. Sound's application does not give a residence address for any of its principals. Accordingly, applicant must submit an amendment which gives all the information required by Section II, Item 4 to the presiding Administrative Law Judge after this Order is released.

6. *Raycee.* At Section III of FCC Form 301, each applicant is required to answer the question whether they either have sufficient new liquid assets on hand or available from committed sources to construct and operate the requested facility for three months without revenue. When Raycee filed his Form 301 on January 26, 1988, he answered that question "no" and added this statement: "Applicant is currently assembling the requisite documentation and will shortly amend to certify in the affirmative." Raycee had over a year to firm up his application but never amended. Therefore, an appropriate issue will be specified.

7. *Radio.* Our attempt to obtain FAA clearance for Radio's proposed tower through the Commission's Antenna Survey Branch has revealed that the Federal Aviation Administration indicates that Radio's tower proposal was withdrawn from consideration by its consultant on December 13, 1988 and, consequently, the FAA considers this case closed. Accordingly, since no determination has been received by the Commission as to whether the antenna proposed by Radio would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

8. *Other Matters.* Applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after April 20, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATE FILED
Broadcast	6/30/88
Sound	8/22/88, 8/25/88, 12/14/88, 9/14/89 (Engineering)
Radio	8/23/88, 1/3/89

9. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Raycee is financially qualified to be a Commission licensee; and

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Radio would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

12. IT IS FURTHER ORDERED, That the Broadcast, Raycee and Pescatello requests for waiver of Section 73.315(a) ARE HEREBY DISMISSED.

13. IT IS FURTHER ORDERED, That Sound shall submit an amendment which contains the information required by Section II, Item 4 of FCC Form 301, to the presiding Administrative Law Judge within 30 days after the release of this Order.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Broadcast, Sound and Radio ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

16. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

17. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's **Rules**, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

18. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CANNON COMMUNICATIONS CORPORATION Chatham, Massachusetts	**MM Docket No. 83-976** File No. BPH-811102AH
FIRST CLASS COMMUNICATIONS, LTD. Chatham, Massachusetts	**MM Docket No. 83-982** File No. BPH-820624AX
HEATHER H. STENGEL Chatham, Massachusetts	**MM Docket No. 83-983** File No. BPH-820624AZ

For Construction Permit for a New FM Station

Appearances

Margaret L. Tobey, Tom W. Davidson, Mark D. Schneider, and *Verna L. Williams*, on behalf of Cannon Communications Corporation; and *Donald E. Ward*, on behalf of First Class Communications, Ltd.

DECISION

Adopted: April 6, 1990; Released: April 26, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member BLUMENTHAL:

BACKGROUND

1. The Board has before it the *Supplemental Initial Decision* (" *S. I. D.* "), 4 FCC Rcd 7514 (1989), of Administrative Law Judge Joseph Stirmer ("ALJ"). It also has before it the exceptions thereto of Cannon Communications Corp., the "limited" exceptions of First Class Communications, Ltd., and the reply pleadings of both parties. [1] First Class Communications is a corporation whose stock is wholly owned by Joseph A. Ryan, who prosecuted his subject application in his own name in the initial proceedings and only recently changed to corporate form. For the sake of simplicity, we will refer to his applicant and exceptions as "Ryan" (but refer to his exhibits as they appear in the record under "FCCL").

2. Several months after the Commission awarded the subject Construction Permit to Joseph A. Ryan, *Order*, FCC 86-244, released May 15, 1986, *aff' g Cannon Communications Corp.*, 101 FCC 2d 169 (Rev. Bd. 1985), Ryan filed (on August 26, 1986) an application to modify his Construction Permit to change the geographic coordinates for the tower site specified in his original application from North Latitude: 41^0, 44', 12", West Longitude: 70^0, 00', 31" to new coordinates to be specified North Latitude: 41^0, 44', 13.7", West Longitude: 70^0, 00', 40.3." The new coordinates would be approximately 750' from the precise spot indicated by his original coordinates, *S.I.D.*, para. 35, both spots located in an industrial development area off of Freeman's Way road near the Town of Brewster.

3. When he had originally applied, his engineering statement described his physical site as follows:

> The proposed location is within the Brewster Industrial Park which contains approximately 100 acres zoned for this and similar industrial uses. It will be necessary to clear some trees and underbrush for the tower base, transmitter building, guy anchors and the guy routes from the tower to each of the three guy anchors. There is presently a roadway into the site from Freeman's Way which may have to be modified some slight amount to reach the actual site of the tower.
>
> * * *
>
> The Brewster Industrial Park Development Finance Authority has issued a letter of consent to lease the proposed site to the applicant. The proposed construction has not been the source of any local controversy on an environmental basis.

S.I.D. at para. 10 (quoting Joint Exh. R-1, p.8). Ryan's August 26, 1986, Construction Permit modification application represented that (*id.*, at para. 33, quoting Joint Exh. R-2, p.16):

> This modification is to make a minor correction to the geographic coordinates and to the ground elevation at the base of the tower which results from the final survey of the proposed site as required by the town of Brewster prior to settlement of the final lease agreement. The elevation of the final site is slightly different from that shown in the original application. Therefore, the tower height is being adjusted three (3) feet in order to maintain the same antenna height above average terrain and the same height above mean sea level of the antenna structure.

4. Ryan's modification application appeared on Public Notice for public comment on September 4, 1986. *Id.*, para. 2. On October 1, 1986, the date on which initial briefs were due on appeals from the Commission's underlying comparative case decision awarding Ryan the Construction Permit, Cannon (and another disappointed applicant, HBZ Communications [2]) jointly filed with the Court of Appeals a "Motion for Remand," asserting that Ryan's modification application demonstrated a lack of reasonable assurance of his originally specified tower site.

5. The "Motion for Remand" was opposed by the Commission, which described Ryan's modification application as "entirely routine," *see S.I.D.*, para. 3, and by Ryan whose own opposition to Cannon's initial remand motion appended his personal affidavit stating (*id.*, at para. 82, quoting Joint Exh. R-4, pp. 6-7 (Att. 2)):

> [T]he August 26 application is for a modification of the Construction Permit to correct the geographical coordinates. No change in transmitter site from that which I originally proposed over four years ago is involved in any respect. The site in question is owned by the Town of Brewster, and administered by the Brewster Industrial Development Financing Authority . . . . I located this site in June 1982, and confirmed its availability for lease (at a price of $400 per acre, per year) for my proposed tower in discussions at that time. A copy of the letter of Milton B. Shaw, Chairman of the Authority to me dated June 21, 1982, confirming its availability, is attached as Appendix A hereto. Moreover, the "Engineering Statement" submitted with my original application (and as Appendix B hereto) noted, at page 2:
>
> The Brewster Industrial Park Development Finance [sic] Authority has issued a letter of consent to lease the proposed site to the applicant.
>
> The past Summer, after the grant of my Construction Permit and preparatory to finalizing a lease and obtaining local permits for the planned tower on this site, I employed a surveyor to survey the site and prepare an appropriate map plotting the location of the tower. In conducting that survey, it was revealed that the coordinates specified in the original application, were off by several hundred feet, and accordingly I directed my Consulting Engineer to prepare an application to modify the permit to correct the coordinates to those revealed by the survey . . . .
>
> * * *
>
> In sum, I intended to use, and made arrangements to use, the site owned by the Town of Brewster when I filed my application in 1982; I have always intended to use that site; and have proceeded to finalize the necessary arrangements to use that site after my permit was granted. In the course of finalizing these arrangements, a survey showed that the site had slightly different coordinates than as stated in the application, and so I filed an application to make the minor correction necessary, but the site itself has never been changed.

6. On December 12, 1986, the Commission granted Ryan's Construction Permit modification application, *S.I.D.*, para. 2; and in *HBZ Communications, Inc. v. FCC*, 825 F.2d 516, 518 (D.C. Cir. 1987), the court rejected that initial remand motion as being "entirely without merit." While chastening Cannon (*et al.*) for failure to timely file an appeal brief, it did not dismiss Cannon's appeal of the underlying comparative decision, but permitted it to pend. Approximately one year after the filing of its initial remand motion with the Commission, and nearly nine months after Ryan's Chatham station went on the air with its tower site fixed according to the revised geographical coordinates, Cannon filed (on October 20, 1987) a second "Motion for Remand" and an accompanying "Petition to Reopen the Record and Enlarge Issues Pertaining to Joseph A. Ryan." Attending these pleadings was the affidavit of Steven Callahan, a former agent of Ryan who had helped put the new station on the air but who alleged: (1) that Ryan had misrepresented his site intentions to the Commission, both initially in 1982 and in connection with his August 1986 modification amendment; and (2) that Ryan had offered both him (Callahan) and another Ryan employee, John Miller, an equity interest in the new station in exchange for their services in building and operating the station. *See S. I. D.*, paras. 4-5. For his part, Ryan alleged that Cannon's principal stockholder, Lynn Landy, confronted Ryan at his station two weeks prior to Cannon's filing of the Callahan affidavit with the FCC, and sought a most propitious settlement of the yet-pending appeal of the underlying case, lest she turn the Callahan affidavit over to the Commission. *See id.*, paras. 70-73.

7. Based upon these fresh allegations, as supported by Callahan's affidavit, the Commission accomplished remand of the underlying licensing case from the court; and by *Memorandum Opinion and Order* (" *Remand Order* "), 3 FCC Rcd 4291 (1988), it remanded this proceeding to the ALJ for a supplemental hearing on the following new issues:

> (A) To determine whether Ryan misrepresented to and/or concealed from the Commission, in his application to modify his Construction Permit filed with the Commission on August 26, 1986, the reasons for and the circumstances surrounding his request to modify his construction permit;
>
> (B) To determine whether Ryan offered equity interests in his station to other individuals in conflict with his previous representation to the Commission that he would be the sole owner of the station;
>
> (C) To determine, in light of the evidence adduced pursuant to issues A and B, whether Ryan is basically qualified to be a Commission licensee; and
>
> (D) To determine whether Lynn Landy, principal owner of Cannon, attempted to obtain an equity interest in Ryan's station by improper means, and, if so, whether Cannon is basically qualified to be a Commission licensee.

Consistent with Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), the burden of proof with respect to Issues (A) and (B) was placed on Cannon, and with respect to issue (D) on Ryan, a burden allocation to which neither party excepts.

THE SUPPLEMENTAL HEARING

8. *Issue (A) : Ryan's Transmitter Site.* The ALJ's findings of fact reflect that, prior to filing his original application on June 24, 1982, Ryan investigated land situated off of Freeman's Way near the Town of Brewster. Ryan testified that his 1982 inspection of the land revealed an unimproved dirt track near a gravel pit (which for convenience the ALJ dubbed "Gravel Pit" road, although the track itself has no name or identifying designation), and that (1) the lots to the right (east) of the unimproved road were privately owned, while (2) the acreage to the left (west) was owned by the Town of Brewster and administered by the Brewster Industrial Development Financing Authority. *S.I.D.*, para. 8.

9. Ryan proceeded to the offices of the Brewster Financing Authority, and secured from its Chairman, Milton B. Shaw, the following letter:

> The Brewster Industrial Development Financing Authority is prepared to lease you a suitable parcel of land for the erection of a radio tower and operations building.
>
> Please do not hesitate to contact us for any additional information you may require.

Id., at para. 9 (quoting FCCL Exh. R-2A, Att. G, p.33). The cost would be $400 per acre (*see* Ryan Affidavit, *supra* para. 5). Ryan relayed this information by telephone to Harry Seabrooke of Silliman & Silliman, his consulting engineers; and based upon Ryan's telephonic description of the locus of the proposed transmitter site, Seabrooke wrote out the physical description of the site appearing with Ryan's original application (*see supra*, para. 3), plotted the geographic coordinates included with that application, and delivered the completed engineering exhibit to Ryan's communications counsel for filing with the FCC. Seabrooke did not visit the Ryan site or conduct an on-site survey prior to calculating the original geographic coordinates. *S.I.D.*, paras. 10-11.

10. Almost immediately after the Commission granted Ryan's Construction Permit on May 15, 1986, Ryan proceeded back to the Town of Brewster, met with Barbara Vaughn (the Town Clerk and a Member of its Industrial Park Development Financing Authority), where Vaughn:

> Showed me map of "Freeman's Way Industrial Park" and the area they had set aside for Tower. (*Didn't appear to be area - I thought it was placed by H.S. [Harry Seabrooke] in adjacent "Brewster Industrial Park". "Freeman's Way Industrial Park" didn't exist in 1982. She said "Brewster Industrial Park" was privately owned.)

S.I.D. at para. 13 (quoting Cannon Exh. R-21 p. 2). Though surprised by Vaughn's reference to "Freeman's Way Industrial Park," an area he felt was generically known in 1982 as "Brewster Industrial Park" (an assertion the Town of Brewster generally affirms [3]), Ryan acquiesced in Vaughn's suggestion that he meet with Peter Hart, a surveyor used by the Town for purposes of defining the precise boundaries of Ryan's tower site, and that Ryan also meet with the Financing Authority on June 16, 1986 to finalize the site agreement.

11. Ryan met with surveyor Hart on June 4, 1986, told Hart he intended to construct a radio tower on industrial land owned by the Town of Brewster, and requested Hart to pinpoint on a map the precise spot of his proposed tower according to the geographic coordinates specified in Ryan's original application. But when Hart thereafter plotted the coordinates calculated by Harry Seabrooke, the spot fell east of the unimproved road and on private land within the now formally named "Brewster Industrial Park." Ryan immediately conveyed this information to Seabrooke and communications counsel, forwarded Hart's map, and sought their advice. *S. I. D.*, paras. 15-16.

12. On June 16, 1986, Ryan did not meet with the Brewster Financing Authority (two members were absent, *see id.*), but he did meet that day with Steven Callahan, who upon the recommendation of a mutual friend Ryan had retained to help construct the Chatham FM station. Although their recollections of the events and conversations of that day differ, Callahan and Ryan drove to the area of the proposed transmitter site and physically inspected the land. In Callahan's version, Ryan suggested to him that he originally had chosen privately owned land on the right (east) side of the dirt track at Seabrooke's suggestion, because the land to that side had a slightly higher elevation than the Town-owned land to the west. *Id.*, para. 18. (Since Ryan's actual tower, built several months later, needed to be only 3 feet taller, Cannon has since abandoned Callahan's cardinal allegation as to why Ryan's site was misspecified, *see* Tr. of Oral Arg. at 1969, just as it has largely ceased to rely upon most of Callahan's testimony on this site issue, *see id.* ; *see also* Cannon Exceptions at 26-27 & n.12; it has also legally abandoned Callahan's claim that he was offered an equity interest in Ryan's station, *see* Tr. of Oral Arg. at 1958; *see also* Cannon Exceptions at 13-26.)

13. After Ryan agreed to retain Callahan, they together reviewed matters pertaining to the transmitter site and the many other engineering aspects of the proposed station; and, on June 24, 1986, Callahan wrote to Brewster surveyor, Peter Hart, as follows (*S. I. D.* at para. 24, quoting FCCL Exh. R-2C):

> It was a pleasure talking to you today about the proposed tower project for Joe Ryan off Freeman's Way. I've enclosed a rough diagram of the tower base placement, guy wire positioning, and the necessary area to be cleared to accomplish our goals. I've also sketched in a driveway from the proposed 40 foot road to the building we'll be placing at the base of the tower. As you can see, the actual area to be cleared would be three 10 foot by 200 foot strips and the driveway.
>
> As I mentioned, Joe will be needing the total amount of acreage needed for the tower for an application with the town's Development Authority. If you can call him with that figure, I would appreciate it. I believe he will then need a drawn plat with tower and guy placement indicated. Joe will be delivering to you a topo map which will need the exact tower placement point as we are making a slight change and have to recompute our maximum tower height for the F.C.C. You can return this to Joe and he will send it immediately to our Washington consultant.
>
> Thanks for your help and assistance and please feel free to contact me if you have any questions.

At hearing, Callahan testified that he used the words "slight change" in his letter to Hart because the distance "wasn't very far at all." *S.I.D.* at para. 25 (quoting Tr. 1554). After Ryan filed for his Construction Permit modification in August 1986, and subsequent to the filing of the initial Cannon (and HBZ) "Motion for Remand" with the Court of Appeals, Callahan wrote to Ryan as follows (*S. I. D.* at para. 39, quoting Cannon Exh. R-1, p. 24 (Att. 3)) [4]:

> RE: KRAVETZ [RYAN COUNSEL] MEMO . . . IF YOU NEED ANY ASSISTANCE WITH TESTIMONY WITH THE COURT OF APPEALS . . . DON'T

> HESITATE TO ASK . . . I AGREE THAT'S AN UNUSUAL TACT HBZ AND AND (sic) CANNON TO MISS THE BRIEFS AND CALL FOR A REMAND . . . POSSIBLY A "DESPERATE" MOVE? LET ME KNOW IF ANY ASSISTANCE IS NEEDED WITH THE 11/24 BRIEF.

14. The record next reflects that, from June 1986 through March 1987, Callahan worked either full or part-time for Ryan helping to put the new Chatham station (WFCC-FM) on the air. *S.I. D.*, paras. 40-44. For part of that period he was also employed full-time as the Chief Engineer of two Providence, Rhode Island radio stations, but Callahan then moved to St. Petersburg, Florida for a period in October 1986. Although Callahan was paid a retainer by Ryan of $1500 per month, plus expenses (including air fare to and from Florida) commencing in November 1986, the record is also clear that Callahan vigorously sought from Ryan an equity interest in the new Chatham station, and he presented to Ryan several times proposals for such an ownership interest. *See, e.g., id.*, paras. 42, 46. [5]

15. Callahan left Ryan's employ in March 1987 (in and around the time WFCC-FM went on the air); the immediate parting was said to be "amicable," but the two fell out when Callahan presented Ryan with a bill seeking $36,000 for his services, and another $11,850 for an auxiliary transmitter Callahan had secured for no cost from a Springfield, Massachusetts radio station. Ryan found the spare transmitter to be "useless," refused to pay all (or part) of the bill, and Callahan sought to negotiate the bill with Ryan and Ryan's communications counsel (Donald Ward). *Id.*, paras. 47-48. Ward did not respond satisfactorily, so on May 14, 1986 Callahan wrote to Ward as follows (*id.*, at para. 48, quoting Joint Exh. R-9, p.30 (exh. 4)):

> To this day, I cannot say one negative comment about Joe. My primary wish is to be able to walk down Main Street in Chatham and not have to have him cross to the other side to avoid me. I'm sure we can develop a fair and equitable negotiation of my hours, expenses and equipment, but I most want to regain my once favorable relationship with Joe.

16. Nonetheless, in early June 1987, Callahan approached Cannon counsel and complained of his failure to secure satisfactory consideration from Ryan. He also advised Cannon counsel that he had information about its yet-pending court case. In August 1987 (and several months prior to Cannon's filing of its second "Motion for Remand"), Cannon counsel summoned Callahan to Washington, whereupon (*S.I.D.* at para. 50; footnotes omitted):

> At their first meeting, Callahan made clear to Cannon's counsel that he expected to be compensated for his "time" and "expense." Callahan initially suggested that he might be compensated by employment at one of the radio stations owned by Ms. Landy's husband, by brokering the acquisition and installation of equipment at those stations, or by employment at the Cannon station if his testimony enabled Cannon to obtain the construction permit. (Tr. 1175-1177.) Cannon's counsel did not accept any of those alternatives, but told Callahan that they would examine the matter and could come to some type of agreement. (Tr. 1174-1175.) On September 16, 1987, Ms. Landy wrote Callahan agreeing that Cannon, in return for Callahan's affidavit and testimony, would pay him all his expenses incident thereto plus "reasonable compensation for your loss of time in providing the affidavit or testimony. (FCCL Ex. R-6.) Pursuant to that agreement, through November 1987, Cannon had paid Callahan a total of $4,066.54 for his services and out-of-pocket expenses in preparing his affidavit of October 2, 1987. (FCCL Exs. R-7, R-8.)

The record does not reveal the total amount that Callahan has been paid by Cannon for his assistance. *Id.* [6] In any event, Callahan executed the critical affidavit that Cannon principal Lynn Landy presented to Ryan in October 1987, then filed with the Commission several weeks later, and which affidavit formed the basis for the Commission's July 1988 *Remand Order*.

17. After considering all of the testimony and demonstrative evidence adduced under this issue, the ALJ's conclusions, *S. I.D.*, paras. 77-88, can be summarized as follows: (1) that Ryan, after receiving "reasonable assurance" of land for his site from the Town of Brewster in 1982, always intended to use Town-owned land and not privately-owned land nearby; (2) that as a "result of the [Peter] Hart survey" conducted in the summer of 1986, Ryan first discovered that the geographic coordinates originally specified fell upon private land rather than the Town-owned land; (3) that the "reasons for and the circumstances surrounding the [August 1986] request to modify the construction permit, as stated by Ryan, represent a substantially accurate statement of the facts and do not constitute misrepresentation or concealment"; (4) that Callahan's suggestion that Ryan had intentionally specified the private land to the east of the unimproved road (perhaps because it was 3 feet higher) was contradicted by the overwhelming weight of evidence, and that Callahan (a "disgruntled former employee") was unworthy of belief, having first told the Brewster surveyor (Peter Hart) that Ryan sought only a "slight change" in coordinates, offered to assist Ryan with his testimony in the Court of Appeals, and then approached Cannon with a different story in exchange for payment for his expenses and for his time at his hourly rate for engineering.

18. *Exceptions.* In reviewing Cannon's exceptions, it is important to distinguish what Cannon does *not* argue from the rather narrow theory of its case against Ryan. Thus [7]:

> Ryan's undisputed intention to specify land owned by the Town of Brewster is irrelevant to the real issue and does not bolster Ryan's position. The real issue is whether Ryan wrongly identified the Town-land during his site search, and covered up this mistake in later modifying the site, and not whether Ryan intended to specify Town-owned land, a point Cannon readily admits.

It claims that "even without reliance on any testimony of Steven Callahan, Ryan's representation [to the FCC in August 1986] that 'no change in transmitter site from that . . originally proposed [was] involved in any respect' was untrue and misleading." [8] In support of its theory that

Ryan misspecified the actual site, rather than simply the geographic coordinates, and then attempted to cover up the flaw by filing a modification application claiming that the error was the result of a later survey, Cannon makes a number of arguments, which we address *seriatim*.

19. First and foremost, Cannon asserts that the filing of the change in coordinates in the form of a modification application is itself evidence of Ryan's sloth. It contends that, "in an effort to prevent his competitors from learning of the modification, discovering the error, and challenging whether he had good cause for an amendment, Ryan filed an *ex parte* application to modify his site, rather than a petition for leave to amend his still-pending application." [9] It attributes Ryan's motivation for use of the modification procedure to his knowledge that another applicant in this comparative case, Heather Stengel, was denied permission to amend the site(s) specified in her application during this proceeding for lack of "good cause." While acknowledging that any error of Ryan in this regard is not to be likened to the gross deficiencies of Stengel in securing (or, in Stengel's situation, *failing* to secure) a transmitter site, it nonetheless posits [10]:

> The legal significance of the differences between Stengel's mistakes and Ryan's mistakes at hearing, however, is irrelevant to Ryan's state of mind in 1986. To Ryan, the two situations appeared ominously similar and provided Ryan with a clear motive to deceive and dissemble.

20. While Cannon insists that, by filing a modification application, Ryan "surreptitiously attempted to amend his application outside of the FCC's comparative process," [11] we find that nothing can be made of Ryan's use of the modification procedure. Whereas Section 73.3522(b) of the Commission's Rules, 47 CFR § 73.3522(b), governs post-hearing designation amendments to applications yet in the hearing process, Ryan's Construction Permit was granted by the Commission in May 1986, and any change to that permit would then be governed by Section 73.3533 of the Rules ("Application for construction permit or modification of construction permit"); *see also* Section 73.3535 ("Application to modify authorized but unbuilt facilities . . . ."). *But cf.* Section 1.65 ("an application is 'pending' . . . from the time it is accepted for filing . . . until a Commission grant or denial of the application is no longer subject . . . to review by any court"). Under Section 308(a) of the Communications Act, 47 U.S.C. § 308(a), "[t]he Commission may grant construction permits . . . or modifications . . . thereof upon written application"; and, under Section 309(b) of the Act, it may not grant (absent emergency) such a modification application sooner than thirty days following Public Notice of acceptance for filing, to which public notice any party in interest can file a petition to deny. 47 U.S.C. § 309(d)(1). Here, the Commission published its Public Notice on September 4, 1986, *S.I.D.*, para. 2, a notice of which Cannon was well aware, *see id.*, at paras. 38, 64, and to which notice Cannon's response was to file with the court its (subsequently rejected) "Motion for Remand." In light of the foregoing, we do not take Ryan's filing of a modification application as evidence of any intent to conceal.[12]

21. Second, Cannon seeks to show that Ryan actually chose the privately-owned land in 1982 by reference to several extrinsic indicia. For instance, it argues that Ryan's 1982 notes underscore Lot 35 on a plat map Ryan utilized in his initial reconnoitre of the industrial park area, that Lot 35 was on private property east of the unimproved dirt strip, and that [13]:

> Ryan's notes reflect that "Lot 35" in the Brewster Industrial Park was 31.5 acres and was "industrial." *Id.* The references in Ryan's notes to Lot 35 and "industrial" are underlined twice, unlike the notations regarding other parcels of land in the privately-owned industrial park, making it clear that Lot 35 was of special importance.

However, the record shows: (1) that whereas Lot 35 is described by Cannon itself as comprised of 31.5 acres, Ryan's 1982 description of the land to the FCC depicted an area containing "approximately 100 acres" (*see supra* para. 3); and (2) that even Ryan's *original* geographic coordinates did *not* fall upon Lot 35. [14]

22. Cannon also submits that engineer Harry Seabrooke's 1982 placement of Ryan's original geographic coordinates to the east of the unimproved road, after telephonic conversation with Ryan, is solid evidence that Ryan intended to specify the site that (albeit inadvertently) fell upon the private rather than the public acreage. And that inasmuch as the unimproved road "was clearly marked on the map" utilized on both ends of the 1982 phone conversation between Ryan and Seabrooke, Ryan should have noticed any misplacement of the site upon his review of the application prior to FCC filing. Yet, Seabrooke (who never visited or surveyed the site described by Ryan) testified that he did not recall plotting his original coordinates by reference to any unimproved road. *See* Tr. 1749; *see also* Tr. 1729-1740. Ryan, who registered surprise in 1986 at finding that the Town of Brewster had set aside acreage in an area now-styled "Freeman's Way Industrial Park" (Town-owned), *S.I.D.*, paras. 13-14, did review his FCC application at counsel's office, but stated that he did not notice in 1982 that the site was incorrectly plotted. *Id.*, para. 11. [15]

23. Finally, Cannon submits that the wording of Ryan's August 1986 modification application plainly reveals Ryan's lack of candor, to the degree that it states that he discovered the error in geographic coordinates as the result of a survey of the land, when in fact he became aware of the probable error at his May 23, 1986 meeting with Town Clerk, Barbara Vaughn. It contends that Ryan's August 26, 1986 affidavit (*see supra*, para. 3) suffers from the same infirmity. [16] Because, Cannon contends, Ryan was actually changing his site rather than simply his geographic coordinates, and feared the same fate as Heather Stengel, he consciously misled the Commission into believing that he had originally proposed Town-owned land slightly to the west, rather than the privately-owned land on which the original geographic coordinates fell.

24. Apart from the fact that Cannon's thesis here presupposes its own major premise that Ryan initially chose a site in the privately-owned tract, Ryan responds that the term "survey" used in his 1986 modification request, and in his affidavit, was intended to describe the *process* by which he determined the error, that he never used the term "on-site" survey as suggested by Cannon, and that the term meant no more than those steps taken starting in late May 1986 to finalize his extant site agreement with the Town of Brewster, including (but not necessarily

limited to) Town surveyor Peter Hart's June 11, 1986 (non-"on-site") plotting of the originally specified coordinates. [17]

25. *Discussion.* After reviewing the totality of the evidence, the ALJ concluded:

> The record provides no explanation how this error occurred. Whether Ryan, who is not an engineer, failed to provide a sufficiently precise oral description of the site when he telephonically communicated this information to his engineer, or whether Ryan's engineer may have misinterpreted the description Ryan gave him are the most reasonable explanations. While Cannon argues that Ryan may have believed that the land on the east side of the Gravel Pit Road was also owned by the Town of Brewster and specified this site mistakenly believing that it was Town of Brewster property, there is no creditable evidence supporting this speculation.

S.I.D., at para. 81. However, as indicated above, the ALJ found no persuasive evidence to support Cannon's charge of deliberate misrepresentation. Without reliance on Steven Callahan's direct testimony that Ryan expressly apprised him that he *intended* to specify the slightly higher, privately-owned tract to the east of the unimproved road, and in the absence of other demonstrative or circumstantial evidence plainly proving the case one way or another, the determination on this misrepresentation issue reductively turns on Ryan's testimony that he believed he was consistently specifying the Town-owned site on which he later actually built. The ALJ squarely found this so, *see id.*, at paras. 82-88. While the Board has exhibited no hesitancy in reversing an ALJ on a misrepresentation issue, even where it has meant the costly loss of a valuable broadcast license, *see, e.g., Mid - Ohio Communications Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986), *review denied*, 5 FCC Rcd 940 (1990); *KQED, Inc.*, 3 FCC Rcd 2821 (Rev. Bd. 1988), *review denied*, FCC 90-66, adopted February 8, 1990, we are equally cognizant that we should not overturn the credibility findings of an ALJ unless "reversal is supported by substantial [record] evidence." *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1141 (D.C. Cir. 1985).

26. Here, Cannon bore the burden of proof to demonstrate by a preponderance of the record evidence, *see Steadman v. SEC*, 450 U.S. 91 (1981), that Ryan's 1986 modification application intentionally misrepresented the basis for his request, and (under Issue C) that such misrepresentation demonstrates that Ryan is unworthy of the Commission's trust to hold a broadcast license. *See Character Qualifications*, 102 FCC 2d 1179, 1210-1211, *recon. denied*, 1 FCC Rcd 421 (1986). Disqualification for misrepresentation is, in the words of Judge Mikva, "a blunderbuss," *WADECO, Inc. v. FCC*, 628 F.2d 122, 133 (D.C. Cir. 1980) (dissenting statement), and not to be triggered unless substantial evidence clearly reveals serious and deliberate falsehoods. *See, e.g., Catoctin Broadcasting Corp. of New York*, 4 FCC Rcd 2553 (1989), *aff'g*, 2 FCC Rcd 2126 (Rev. Bd. 1987). Nothing in the pleadings or in the underlying record persuades us that the ALJ erred in the trial or disposition of this issue. [18] As the Commission reiterated in *MCI Telecommunications Corp.*, 3 FCC Rcd 509, 512 (1988)(internal citation omitted):

> Unless there is evidence showing "deceptive intent," we will not be able to find that misrepresentation or lack or candor has occurred. . . . The "bare existence of a mistake" in an application, "without" any indication that the licensee meant to deceive the Commission, does not elevate such a mistake to the level of an intentional misrepresentation or raise a substantial and material question of fact."

Based on the entirety of the record evidence, we cannot say convincingly that actionable deceit rather than error animated or attended Ryan's modification application.

27. *Issue (B) : Ryan's Ownership Integration Pledge.* As indicated above, the affidavit of Steven Callahan, which formed the basis for the Commission's remand for this supplemental hearing, alleged that Ryan had agreed to provide equity interests in the new Chatham FM station to both him (Callahan) and to John Miller, a broadcaster who began to perform some actual work for Ryan in May 1986. After reviewing the demonstrative evidence and hearing testimony on this issue, the ALJ found that although Callahan and Miller both avidly sought equity interests in Ryan's station, and incessantly goaded him for such starting with the Commission's Construction Permit grant in 1986, "the discussions between Ryan and Callahan, and Ryan and Miller, were too general and non-specific to amount to a promise of future equity." *S.I.D.* at para. 90. Though Cannon does not except to the ALJ's resolution of this issue insofar as Steven Callahan, it urges that the ALJ erred on this issue in crediting Miller's testimony that he was not offered equity in Ryan's station, and in failing to draw conclusively adverse inferences from correspondence between Miller and Ryan, as well as from the very fact that Miller did actually serve in the employ of Ryan. The factual findings, to which Cannon does not except, are set out at *S. I.D.*, paras. 51-63, and are summarized below.

28. Prior to May 1986, Miller was employed at WQRC-FM, Hyannis and WCVX-TV, Vineyard Haven, and held an (unspecified) equity interest in each of those two Massachusetts stations. From the outset, Miller made it plain that he desired an equity interest in Ryan's FM station. On May 9, 1986, Ryan wrote Miller that although his entity was "a 100% Joseph A. Ryan sole proprietorship," he did not necessarily disagree with Miller's assumption that "the entity may or will change as circumstances change." *Id.*, at para. 52 (quoting Tr. 1611-1612). On June 5, Miller responded to Ryan (*id.*, at para. 53, quoting Cannon Exh. R-4, p. 4):

> You are aware from our talks and what you read in that WOCB document I prepared that equity is not only very important to me, but a heavy motivator for me. I will be quite literally pouring my heart, sole [sic] and marketable abilities into this venture . . . and no amount of salary alone will be fulfilling.
>
> * * *
>
> One way or the other, I would like to acquire a 35 percent interest over a period of time. I hardly expect you to give away your assets, but based on your own experience at WCVB, I suspect you recognize the value of truly vested employment. Initially,

> it would be very important for me to acquire a floor of a 15 percent interest within 18 months of licensing . . . .

29. Nonetheless, Ryan's October 1, 1986 written offer to Miller proposed no equity share; only an annual salary of $45 thousand, 4% of cash receipts above $500 thousand, and certain insurance benefits. *Id.*, para. 54. Miller and Ryan met on October 7, with Miller seeking a minimum 15% equity stake in the FM station. The following day, Miller wrote to Ryan and suggested that Ryan's communications counsel consider "something more tangible" than Ryan's agreement to later consider a change in Miller's potential employment agreement, perhaps an option or a right of first refusal on any future Ryan sale of equity interests. [19]

30. On October 23, 1986, Ryan sent Miller a revised employment proposal, calling for a $55 thousand annual salary; while Ryan's letter did not address the issue of equity for Miller, it concluded: "This agreement -- which can be 'refined' at a later date -- will cover the first year of on-air operation." *S.I.D.* at para. 58 (quoting Cannon Exh. R-14). This did not satisfy Miller, who wrote to Ryan again on October 27, saying he had discussed with Ryan's attorney (Ward) ways of achieving the 15% equity interest Miller sought. Miller wrote to Ryan again on December 9, suggesting that he be permitted to invest in Ryan's station or to loan money in exchange for an option, [20] and again on January 23, 1987, suggesting in exchange for his services and $30 thousand in cash "a convertible debenture that could be converted into stock after the one year FCC required waiting period . . ., " ultimately looking toward "a 49% interest in the [FCCL] corporation . . . ." *Id.*, paras. 59-61. [21]

31. At the hearing, Miller testified that, while he very much coveted an equity interest in Ryan's new FM station, Ryan would do no more than agree to discuss any potential equity interest at some point in the future when it was "appropriate" to do so. *Id.*, para. 62 (citing Tr. 1622-1624). However, Miller left station WFCC-FM shortly after Cannon principal Lynn Landy's October 1987 visit to Ryan with the Callahan affidavit, *id.*, para. 63, but remained as a consultant to Ryan for approximately six months thereafter, and hopes to do business with WFCC-FM in Miller's capacity as an independent sales representative. *Id.*

32. *Exceptions*. Cannon charges that the ALJ erred in concluding that any Ryan promises to Miller "were too general and non-specific to constitute a promise of future equity." [22] It claims, first, that an "implicit" understanding between Ryan and Miller must be inferred because Miller did leave two stations in which he had an equity interest, and because he accepted the offer from Ryan to work at WFCC-FM as station manager. It argues that Miller initially began to assist Ryan in the autumn of 1985, counseled Ryan until the Commission's May 1986 grant of the Construction Permit, and spent substantial time aiding Ryan without compensation until January 1987. [23] Cannon next contends that contemporary documentary evidence (*i.e.*, Miller's multiple missives to Ryan) prove that Miller had "received tacit assurances from Ryan that his demand would be met one year after the FCC litigation terminated and the station went on the air," [24] and that "Miller's correspondence demonstrates that Ryan and Miller had agreed that at some point in the near future Ryan would give equity to Miller." [25]

33. Cannon also attacks Miller's hearing testimony that, while Miller very surely desired an equity share in WFCC-FM, he and Ryan had no tacit understanding of a future equity interest, only Ryan's promise to discuss Miller's overall compensation arrangement after one year. It labels Miller's testimony "self-serving," particularly given "Miller's friendship and professional relationship with Ryan." [26] Cannon goes even further, calling Miller's testimony (variously) equivocal, evasive, distorted, inconsistent, and implausible. [27]

34. *Discussion*. The Commission's *Policy Statement on Comparative Broadcasting Hearings*, 1 FCC 2d 393, 395 (1965), holds that significant advantage is due to applicants proposing full-time integration of ownership with day-to-day station management. "As with other [applicant] proposals, it is important that integration proposals be adhered to on a permanent basis." *Id.*, at n.6 (citing *Tidewater Teleradio, Inc.*, 24 RR 653 (1962)). Where it appears that a Construction Permit grantee has not effectuated an integration pledge as proposed, the Board has called for the taking of evidence to determine the cause and the qualifications of the grantee. *See, e.g., Washington's Christian TV Outreach, Inc.*, 94 FCC 2d 1360, 1366-1367 (Rev. Bd. 1983). And where it appears that an applicant claiming to be a sole proprietor, thus seeking 100% quantitative integration credit, may have secretly offered an equity share to an unidentified party, the Board has likewise ordered a hearing. *Linda Crook*, 3 FCC Rcd 1868 (Rev. Bd. 1988).

35. In the underlying comparative hearing in this case, Ryan prevailed over several other qualified applicants, HBZ and Spinnaker, largely on the promise of his 100% ownership interest in (and management proposal for) the Chatham FM Construction Permit. *See Cannon Communications Corp., supra*, 101 FCC 2d at 180-183. [28] Hence, the question to be resolved under Issue (B), as in *Linda Crook*, is whether Ryan prematurely agreed to dilute his 100% ownership interest in the station by alienation of a portion of that interest to John Miller in exchange for Miller's personal services.

36. As did the ALJ, we have reviewed most closely the correspondence between Miller and Ryan to attempt to ascertain Ryan's intent. Unlike *Linda Crook*, where the record reflected correspondence from the applicant herself seeking $30 thousand in exchange for an equity interest in her prospective station, *see* 3 FCC Rcd at 1868-1869 n.5, the traffic here all seems to flow in the opposite direction: the record reveals a persistent effort on the part of Miller to secure Ryan's agreement to relinquish a portion of his 100% equity. But, apart perhaps from Ryan's cryptic response that his employment agreement with Miller could be "refined" after the first year of on-air operation, *see S.I.D.*, para. 58, [29] there is no demonstrative evidence to support the claim that Ryan agreed to a transfer of equity. Even that remark was self-obviously ambiguous, and probably intended to be. Indeed, in his successive letters, Miller launched a flotilla of ideas for acquiring an equity share in WFCC-FM (*viz.*, option, "phantom stock," loan or investment, convertible debenture, bank collateral), but it seems glaring from the letters themselves that Miller was painfully unable to persuade Ryan to offer him *anything* tangible, at least through the letter of January 23, 1987 (*see supra* note 21.)

37. Beyond the Miller/Ryan correspondence, Cannon points to Miller's consistent beseechments for an equity share, and it implores us to infer that Miller must have

received some assurance from the fact, *simpliciter*, that Miller left his previous employment and went to work for Ryan. [30] At oral argument, Cannon counsel espoused its theory [31]:

> [Cannon Counsel]: The circumstantial evidence I think substantiates that he [Ryan] did agree to *something and it's a question of what that something is.*
>
> *He didn' t want to put anything in writing, he didn't agree on terms, he didn't agree on amount, he didn't agree on when.* But Miller told him equity was threshold. He went to work for -- he left a management level position at less salary. They had a watershed meeting on October 7, 1986, where Miller said it was critically important.
>
> At the hearing, Miller offered a totally preposterous denial. He said if Ryan doesn't want his kids to inherit the station maybe some day. The very next day he wrote a letter saying, I need a written, definitive agreement. There was an agreement.

Despite from the fact that we too are left to speculate on "what that something is," Cannon asks us to draw an inference that seems materially at odds with the record and Cannon's own operative theory. On the one hand, its exceptions argue that Miller had been assisting Ryan since the autumn of 1985, and simply would not have accepted employment without a bankable agreement as to an equity share. But Miller's 1986-1987 correspondence to Ryan radiates that, *pace* Miller's passionate pursuit, Ryan declined any firm agreement on equity; only a promise to reconsider Miller's overall compensation after the first year of on-air operation. And inasmuch as Lynn Landy's visit to Ryan in October 1987 with the Callahan affidavit occurred during that first year, with Miller departing WFCC-FM a few weeks later, we must again speculate on what that future "something" might have been. Cannon admits that it does not know (but suspects an equity share), yet criticizes the ALJ's conclusion that any understanding between Ryan and Miller as to the future was "too general and non-specific" to conclusively find a promise of equity that would dilute Ryan's 100% control of the station.

38. Here, again, the burden was on Cannon to prove by a preponderance of record evidence that "Ryan offered equity interests in his station to other individuals in conflict with his previous representation to the Commission that he would be the sole owner of the station," in the terms of Issue (B). The record plainly discloses that, no sooner did Ryan receive his Construction Permit in May 1986, than Steven Callahan, John Miller (and later Lynn Landy) all prevailed upon Ryan for a share of his equity. But the hard record evidence just as plainly reveals Ryan's stolid resistance to the opportunings (even ignoring Miller's testimony). Cannon does not except to the ALJ's conclusion that Callahan was offered no equity, nor does it deny that Ryan flaty rejected its own principal's (Lynn Landy's) quest for an equity share in WFCC-FM for herself. [32] We are left, then, to speculate along with Cannon whether Ryan offered Miller "something" in the future, what that "something" might be, when it might accrue, and so forth. We cannot reverse the ALJ's conclusion under this issue on so wobbly a bed of conjecture.

39. *Issue (D) : Lynn Landy Abuse of Process.* This issue was added on the basis of Ryan's complaint that, shortly after the Court of Appeals rejected Cannon's initial "Motion for Remand," Cannon's principal Lynn Landy appeared (on October 5, 1987) at Ryan's station, confronted him with the October 2, 1987 affidavit of his erstwhile subaltern (and later Cannon consultant), Steven Callahan, and demanded a settlement of the underlying case, lest Landy refer the Callahan affidavit to the FCC. It is undisputed that Landy's settlement offer to Ryan contained two alternatives: "a 51% [Landy]/49% [Ryan] equity split or a 100% buy-out." [33]

40. The record reflects that, following his dispute with Ryan over the unpaid bill, Callahan approached Cannon counsel in June 1987 and offered, for appropriate consideration (*see supra* para. 16), to execute an affidavit supporting the claims giving rise to Issues (A) and (B). Over that summer of 1987, and with Landy's authority, Cannon counsel met with Callahan and determined that Callahan's information was potentially significant. *S.I.D.*, paras. 65-68. Landy instructed her counsel to Federal Express copies of Callahan's affidavit to her in Massachusetts; she received the affidavit on the morning of October 5, 1987, and drove immediately to Ryan's station located less than two miles from her home with the intention of persuading Ryan to enter into a settlement of the yet-pending appeal of the basic comparative cases. *Id.*, paras. 69-70.

41. As the ALJ correctly observed, *id.*, para. 71, the facts surrounding Landy's October 1987 visit are not in material dispute. Landy concedes that she sought a settlement in which she would have received, at a minimum, a majority equity interest in WFCC-FM. The only conflict between Ryan and Landy of decisional consequence under this issue is whether Landy offered to forbear from filing the Callahan affidavit with the FCC in exchange for a majority interest in Ryan's station, or whether as Landy claims she apprised Ryan that she would be compelled to lodge the Callahan affidavit with the FCC irrespective of whether Ryan acceded to her alternative settlement terms. Ryan testified that Landy offered to so forbear and brandished the Callahan affidavit as a threat, while Landy avers otherwise. *Compare S.I.D.*, paras. 72-73 *with id.*, paras. 74-75. In any event, Ryan and Landy both reported the meeting to their respective communications counsel, Ryan essentially ignored Landy's settlement proposal, and Cannon filed the affidavit with the Commission fifteen days later with the FCC. [34]

42. After considering the conflicting testimony of Ryan and Landy at this friction point, the ALJ held (*S.I. D.*, at para. 94; footnote omitted):

> Ryan's own testimony does not support the conclusion that Landy offered to withhold filing the Callahan affidavit. Rather, it appears that Ryan misunderstood Landy's remarks and inferred a threat where none was made or intended. It is clear from Landy's testimony, and the notes made by her counsel immediately after the conversation, that Ryan was told that the Callahan affidavit would have to be filed with the Commission. Landy showed Ryan the

> Callahan affidavit and offered Ryan two settlement proposals from which negotiations could be started. She did not threaten to file the affidavit if Ryan did not settle, nor did she offer to withhold filing the affidavit if Ryan did settle.

Finding no explicit threat in Landy's exchange with Ryan, the ALJ resolved Issue (D) in Cannon's favor.

43. Ryan's exceptions counter that Landy's claim that she advised him that the Callahan affidavit would have to be filed with the FCC, *even if* he agreed to yield up 51% of his equity in WFCC-FM, defies logic "because the Commission could not have approved Ryan as a 49% stockholder of a licensee with charges such as those contained in Callahan's affidavit unresolved." [35] That is indisputably correct, *see generally TV 9, Inc. v. FCC*, 495 F.2d 929, 938-940 (D.C. Cir. 1973) (comparative licensing proceeding remanded for issue to determine applicant's basic character qualifications based on conduct of *former* 1.54% stockholder), and we note that Landy claims that she proposed *both* settlement *and* the filing of the Callahan affidavit because "she would rather not spend the time and money necessary to litigate." *S.I.D.* at para. 76.

44. Cannon rejoins by repeating its representation that Landy did advise Ryan on October 5, 1987 that she would file the Callahan affidavit, even if Ryan agreed to relinquishing 51% of the station's equity to her. Further, quoting from the concurring statement of former Chairman Charles Ferris in *Country - Politan Broadcasting, Inc.*, 68 FCC 2d 640, 641 (1978), Cannon submits [36]:

> [S]ettlement agreements cannot be made in a vacuum. In order for the settlement process to work, parties must be free to exchange information regarding the nature and extent of their cases. Only then can an informed decision on whether to withdraw be made. Only then will the public benefit from the process, as negotiations and settlements based on full information will parallel to the extent feasible what result the Commission would have reached in its ultimate decision.

Based on that rationale, Cannon asserts that "it was entirely permissible for Mrs. Landy to advise Ryan, in the context of a settlement discussion, that she had obtained adverse information about the filing of FCCL's modification application and that she intended to file that information with the Commission." [37] It distinguishes the subsequent *Gulf Coast Communications, Inc.*, 81 FCC 2d 499 (Rev. Bd. 1980), where the Board did find an abuse of process, reminding that in that case (1) there was written evidence of a threat to file adverse allegations unless a settlement was achieved, and (2) there was a two-year hiatus until the adverse allegations were submitted to the FCC in another proceeding. Ryan, whose entire exceptions and reply pleadings cite not a single case and furnish no legal analysis whatever (on this or the other hearing issue and are woefully unhelpful in this vital regard), does not compare or contrast *Country - Politan* or *Gulf Coast*.

45. *Discussion*. While we are skeptical of Cannon's claim that Landy approached her single settlement discussion with Ryan seeking a 51%/49% ownership division, while at the same time advising Ryan that she intended to forward the Callahan affidavit to the FCC, we must observe that the affidavit was filed within approximately two weeks of the confrontation. However irrational Landy's purported proposal, the information was not withheld, nor was her approach to Ryan repeated. In contrast to *Gulf Coast*, where the offer to withhold was explicit as a *quid pro quo* for a favorable settlement, we have here little more than the contrary and self-serving testimony of Ryan and Landy over a short verbal exchange. This places the dispute more analogously near the situation described in *Gulf Coast*, 81 FCC 2d at 514 (footnote omitted), where we held:

> This case is therefore unlike *Country - Politan Broadcasting, Inc.*, 60 FCC 2d 361 (Rev. Bd. 1976), *review denied* 68 FCC 2d 640 (1978), in which, because of conflicting and ambiguous testimony by the only two parties to a telephone conversation, the Review Board concluded that there was inadequate evidence to support a finding that a threat had been made.

As we have said with respect to Issues (A) and (B), and however illogical we find Landy's purported intent, we will not overturn the ALJ's credibility findings here in the absence of substantial record evidence that Landy did threaten to withhold to her advantage the Callahan affidavit. While we think the issue is closer than the ALJ appears to have, we concede the absence of hard evidence upon which to ground a complete reversal.

CONCLUSIONS

46. The court has enjoined that the Commission has a responsibility to look for fire "when it is shown a good deal of smoke." *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985); *accord, Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1562 (D.C. Cir. 1988). But as the late President Kennedy once remarked, sometimes "where there's smoke there's a smoke-making machine." Based upon the affidavit of Steven Callahan, the Commission accomplished remand of the underlying comparative case for a full evidentiary hearing on Callahan's allegations. After supplemental hearing before the ALJ (who did not award the Construction Permit to Ryan in his original *Initial Decision)*, the ALJ did not find Callahan to be a credible witness but a "disgruntled former employee" [38] with implausible theories and an axe to grind against Ryan, and even Cannon no longer relies very heavily (if at all) on Callahan's testimony.

47. Under Issue (A), the ALJ found that Ryan sought and received reasonable assurance of acreage from the Town of Brewster in 1982, that he returned to the Town authorities in 1986 to claim his promised tower site, that he modified his Construction Permit and built on Town land only about 750' from his originally indicated geographic coordinates, that the misspecification of coordinates is not uncommon (a fact Cannon does not deny), and that he did not misrepresent or conceal in connection with his modification application. Although the cause of Ryan's original specification of the slightly wrong coordinates is not established on this record, the Board finds no substantial evidence, and certainly not a preponderance of evidence, upon which to reverse the ALJ's conclusions under this issue, especially when some deference is accorded his highly detailed credibility findings.

48. Under Issue (B), and despite the demonstrative evidence that Ryan regularly refused John Miller's sundry proposals for some tangible equity share in WFCC-FM, and refused to consider Miller's overall employment arrangement until after the first year of station operation, Cannon wishes us to infer a tacit agreement on equity although Cannon readily concedes that it has no knowledge of *what* that agreement was, or *might* have matured into, or *when* it might accrue, or *what* form it might take, [39] or *what* consideration might be exchanged (*see supra* para. 37). *Compare Linda Crook, supra*. It here asks too much, and we cannot overturn the ALJ largely on the basis of almost pure haruspication. *See WHW Enterprises, supra*. [40]

49. Nor will we reverse the ALJ on Issue (D). Nothwithstanding our jaundiced view of Cannon's claim that it sought settlement of this case on the strength of Callahan's affidavit, but intended to submit that affidavit to the FCC even if settlement had been achieved, the affidavit was submitted rather promptly and we do not have the quality of evidence upon which we based our reversal on an abuse of process question in *Gulf Coast, supra*. The circumstances here are more closely akin to *Country - Politan, supra*, 60 FCC 2d at 366-368, where we found insufficient evidence in the conflicting claims of the self-interested witnesses over the contents of a private oral confrontation, and where the affidavits were promptly filed. We are tempered by that precedent.

50. ACCORDINGLY, IT IS ORDERED, That the Motion to Dismiss filed on December 1, 1989 by First Class Communications, Ltd. IS DISMISSED as moot;

51. IT IS FURTHER ORDERED, That the unopposed Motion to Correct Transcript of Oral Argument filed on March 7, 1990 by First Class Communications, Ltd. IS GRANTED except to the extent that page 1979, line 8 shall remain unchanged; and

52. IT IS FURTHER ORDERED, That the application of Cannon Communications Corporation (File No. BPH-811102AH) IS DENIED, and the application of First Class Communications, Ltd. (File No. BPH-820624AX) for a Construction Permit to establish a new FM broadcast station at Chatham, Massachusetts IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Also before the Board is Ryan's "Motion to Dismiss" Cannon's application, filed December 1, 1989, and pleadings responsive thereto. In it, Ryan argues that Cannon failed, under 47 CFR § 1.65, to timely and completely supplement its application to show new media interests acquired by the husband of its principal, Lynn Landy. We find no *prima facie* merit in Ryan's motion, but in view of our disposition of the exceptions on the merits, merely dismiss the motion as moot.

[2] HBZ is no longer a party to this case, having reached a settlement with Cannon. *Remand Order*, 3 FCC Rcd at 4292 n.1. The status of the other captioned applicant, Heather Stengel, is not shown on this record.

[3] *See* FCCL Exh. R-1 (at exh. 2). *See also* Cannon Exceptions at 39-40 n. 22, where Cannon acknowledges that the Town of Brewster in 1982 referred to its area as "the 'Industrial Park'" and that the term "Freeman's Way" Industrial Park did not eventuate until several years later. *See* Ryan Reply at 9-10 nn.7, 8.

[4] It will be recalled from *HBZ Communications, Inc. v. FCC, supra*, that HBZ and Cannon missed their appellate brief date with the court.

[5] At *S.I.D.*, para. 46, the ALJ reports:

> Shortly, before leaving WFCC, Callahan drafted "what I felt was the agreement that we had," which he submitted to Ryan. (Tr. 1285.) The proposed agreement (FCCL Ex. R-2A, p. 32 (Att. F)) sets forth the services Callahan "agrees to provide" and the compensation Ryan would provide to Callahan. The proposed agreement also provides that "one year from the air date of WFCC, Callahan could be eligible for equity participation in the ownership of WFCC. If such equity is not forthcoming, or if this agreement is terminated by either party before that date, then Callahan will be entitled to be compensated . . . in an amount equivalent to the total hours worked . . . multiplied by Callahan's hourly rate for consultation," less amounts paid under the retainer arrangement. Neither Callahan nor Ryan ever executed the proposed agreement, nor did they ever discuss its substance because Callahan left the station a few days after presenting the document to Ryan. (Tr. 1285-1286; FCCL Ex. R-2A, p. 32 (Att. F).)

[6] "Among the expenses for which Cannon is reimbursing Callahan are the charges of the attorney who has represented him at his deposition and at hearing." *S.I.D.* at para. 50.

[7] Cannon Exceptions at 35.

[8] *Id.*, at 26.

[9] *Id.*, at 32; *see also id.*, at 41 n.23.

[10] *Id.*, at 33. In the Board's basic decision in *Cannon Communications Corp., supra*, it refused to permit Heather Stengel a post-oral argument attempt to amend her application to specify yet a *fourth* transmitter site, when it was clear that she had never acquired "reasonable assurance" of her first *three* sites. *See* 101 FCC 2d at 171-177. Though Cannon does not go so far as to contend that any Ryan deficiency here was nearly as pronounced as those of Stengel, it contends that Ryan's fear of a similar fate is what motivated his failure to file an amendment (rather than the modification) and to assert without candor that he always intended to specify the land on which he has actually built his transmitting tower.

[11] Cannon Exceptions at 28.

[12] To the extent that Cannon also claims that Ryan's filing of a modification application violated Section 1.65 of our rules, *see generally RKO General, Inc. v. FCC*, 670 F.2d 215, 229-230 (D.C. Cir. 1981), the Commission and the Board have long held that when information is on public file with the Commission, an intent to conceal is difficult to discern. *See, e.g., Superior Broadcasting of California*, 94 FCC 2d 904, 908-909 (Rev. Bd. 1983) (light comparative demerit for failure to report information already on public file with FCC).

[13] Cannon Exceptions at 36.

[14] Ryan Reply (at 5-6) also attacks Cannon's "Lot 35" theory by asserting:

> (5) Cannon's theory also disregards the facts that Ryan's contemporaneous notes of June 20, 1982 (Cannon Exhibit R-20, p. 8) show that he measured the distance from Route 39 to the Brewster Industrial Park as 1/2 mile --

not the 0.3 mile reflected in Seabrooke's preparation of the 1982 application -- and that the August 1986 modification application placed on the corrected coordinates 0.45 miles west of Route 39 -- fully consistent with Ryan's odometer-based measurement of June 20, 1982.

(6) In claiming support for its theory in the fact that Ryan's contemporaneous notes for June 21, 1982, did not refer to Lot 41 (the Town of Brewster site), Cannon disregards Ryan's testimony (Tr. 1879-88) that he stopped making notes concerning the lots to the east of the gravel pit road upon being advised by a clerk in the Assessor's office that the land to the west of that road (Lot 41) was owned by the Town of Brewster, was available, and was administered by the Brewster Industrial Development Authority. He explained that, after being given a xerox copy of the Assessor's map clearly showing the details concerning Lot 41, further note-taking was unnecessary. This is a perfectly rational explanation for the silence in his notes which Cannon finds so incriminating.

In addition to the "Lot 35" theory, Cannon and Ryan also quibble over secondary and tertiary indicia, each seeking to prove that the "evidence" supports its case as to whether Ryan, in 1982, intended to specify the private acreage. *Compare* Cannon Exceptions at 38-40 (physical state of unimproved road and distance from Route 39) *with* Ryan Reply at 7-8 (same). Although the ALJ did not expressly base his conclusions under this issue by reference to these subsidiary indicia, *see S.I. D.*, paras. 77-88, the Board has carefully reviewed the record evidence and finds it to have little (if any) value in deciding this issue. Both sides here engage in a farrago of speculation, and call for the trier of fact to draw inferences that are far beyond the weight of the evidentiary value of whatever "facts" may be present. Like the ALJ, we shall not do so.

[15] Although Cannon contends (and Seabrooke did not dispute) that the short dirt track near the original coordinates was "clearly marked" on the originally submitted map, and it could well be that a clearer copy of the map exists, the Board has closely examined the copy submitted with Ryan's 1982 application (Joint Exh. R-1, Figure 2), and finds little, if any, indication of the unimproved road. *Compare* Joint Ex. R-2, Figure 2 (map accompanying Ryan's August 1986 modification amendment). In any event, the distance between Ryan's 1982 and 1986 geographic coordinates would have placed the proposed site only 7/32nds of an inch away on the 7" x 10" scale of Joint Exh. R-1, and there seems to be no particular reason why Ryan would have noted that difference in his 1982 review of his entire Form 301 at counsel's office prior to FCC submission, even if the unimproved road were clearly marked. Ryan is not an engineer, and would have had no special reason then to closely re-scrutinize his Silliman & Silliman Engineering Exhibit.

[16] Cannon Exceptions at 41-44.

[17] Ryan Reply at 11-12.

[18] Even if we believed that Ryan's August 1986 modification application should have contained a more complete explanation of the circumstances surrounding the need for the application (which we do not), disqualification would not be warranted here. *See, e.g., Broadcast Associates of Colorado*, 104 FCC 2d 16, 19 (1986). And, unlike the practice at the time Judge Mikva issued his dissent in *WADECO*, *supra*, the Commission no longer assesses "comparative demerits" for the slightest lack of candor: either the dishonesty is sufficiently serious for total disqualification, or it is not. *Broadcast Associates of Colorado*, 104 FCC 2d at 18-19 n.5.

[19] The pertinent text of Miller's October 8, 1986 letter to Ryan is reproduced at *S.I.D.*, paras. 56-57 (quoting Cannon Exh. R-5), and reads:

> We covered a great deal of ground during our discussions at your house Tuesday night. With respect to future ownership participation, we agreed that Don Ward would be asked to pass judgment on means of giving something more tangible than an "agreement to agree" without compromising the Commission's position on stations created through the comparative process.
>
> * * *
>
> It seems to me that one of the cleanest ways to tamper with your 100 percent representation during the minimally required portion of your full retention would be in the form of an option. That is, a definitive written agreement whereby I would acquire a predetermined interest at a predetermined price during a certain future period of time.
>
> I believe that the existence of such an agreement during the first year of your 100 percent licensee status does not run contrary to either the spirit or letter of the Commission's policies or your representations, for it can be written in such a way that I could not exercise the option until a certain specified date.
>
> Beyond this, and subject to your own long term objectives, I would also have an interest in entering into a right of first refusal on any future full or partial equity interests you now own. Since no one can determine future values at this time, any such agreement should provide for one or more mechanisms for determining price down the road (most likely related to a response to an asking price or a *bona fide* offer to purchase).

[20] The pertinent text of Miller's December 9, 1986 letter to Ryan is reproduced at *S.I.D.*, para. 60 (quoting Cannon Exh. R-7), and reads:

> On another matter, not that you've forgotten, I'm sure we're both anxious to come to terms on this equity participation issue. I have placed blind trust and confidence into your counseled "yes" response to your agreeability to such consideration. However, there is little perceptible movement on the part of Don Ward or Jim Edmundson, but this has not diminished my genuine concern on the topic.
>
> I am still prepared to invest (or loan?) some dollars, including . . . as I mentioned some time ago . . . using equity in personal assets as collateral on additional funds. Regarding the latter, I could borrow a fair amount of money and would do so provided that the station's operation reimburse me for interest on borrowed funds. Since First Class Communications, Ltd., will be a corporation, as I understand it, it still seems to me that an option to acquire a future interest is a viable way to approach the objective.

[21] The pertinent text of Miller's January 23, 1987 letter to Ryan is reproduced at *S.I.D.*, para. 61 (quoting Cannon Exh. R-9), and reads:

> After further soul searching and discussion with Gail, coupled with my already clearly stated need for future equity, I take this opportunity to give you more lucid insight into my willingness to put money and/or collat-

> eral where my mouth is. Under appropriate circumstances, I'd be willing to allow my unencumbered assets to be joined with yours as collateral . . . .
>
> Many months ago I proposed that I eventually acquire a 15% equity interest in the station in exchange for my devotion to managing the station with you and $30,000 cash. As I proposed to Don Ward in early December, this could be handled in the form of a convertible debenture that could be converted into stock after the one year FCC required waiting period or in the form of a simple loan to the corporation in exchange for an option that I could exercise after the year's waiting period.
>
> You and I are both waiting to hear from Don Ward on this concept, and I can only assume he does not recognize the importance of this caveat relative to my long term commitment to you and the station. I hope that gets remedied soon. While I trust your prior word implicitly, *the fact is that it will not be accomplished until it is in writing.* [Empahsis added.]

[22] Cannon Exceptions at 13.

[23] *Id.*, at 15.

[24] *Id.*, at 16.

[25] *Id.*, at 22.

[26] *Id.*, at 17-18 & n.6.

[27] *See id.*, at 19-22 nn. 7-10.

[28] Cannon itself was largely out of the final running because of its demerit under the Commission's primary comparative criterion, diversification of the mass media. *See* 101 FCC 2d at 178-179, 182.

[29] At oral argument, counsel for Ryan was questioned closely about the references to Ryan's first year of on-air operation and asked whether that initial year was linked to Section 73.3597 of the Commission's rules, 47 CFR § 73.3597, which reads in part as follows:

> § 73.3597 *Procedures on transfer and assignment applications.*
>
> (a) If, upon the examination of an application for FCC consent to an assignment of a broadcast construction permit or license or for a transfer of control of a corporate permittee or licensee, it appears that the station involved has been operated on-air by the current licensee or permittee for less than one year, the application will be designated for hearing on appropriate issues unless the FCC is able to find that:
>
> (1) The permit or license was not authorized either through the Minority Ownership Policy or after a comparative hearing or, in the case of low power TV and TV translator stations, the permit or license was not authorized after a lottery in which the permittee or licensee benefited from minority or diversity preferences . . . .

Counsel responded that Ryan was not questioned at hearing about that rule, *see* Tr. of Oral Arg. at 1980-1995. For its part, Cannon does not assert a violation of that rule, perhaps because the rule by its terms applies only to transfers of *control* during the first year, and it is nowhere alleged that Ryan ever contemplated the sale of a majority of FCCL stock. However, *en passant*, we agree with Cannon counsel, *see* Tr. of Oral Arg. at 2006-2007, that merely because it is *permissible* under the rule to alienate control or sell outright a station acquired through the comparative hearing process after the inaugural year, it is *not* permissible to promise "permanent" ownership integration as intended under the 1965 *Policy Statement* when the applicant intends *ab initio* to sell or appreciably dilute that interest after the inaugural year. The fact that the Commission's *Remand Order* specified Issue (B) in this very case reinforces that policy view.

[30] *See* Cannon Exceptions at 15-16.

[31] Tr. of Oral Arg. at 2007-2008 (emphasis added).

[32] *See* Cannon Reply at 5. There is no small irony in the fact that, *prior to* complaining to the Commission that Ryan offered equity shares to others, she very quietly sought a large equity share for herself.

[33] *See id.*

[34] At *S.I.D.*, para. 76, the ALJ records Landy's claim that she was advised by counsel that "she was obligated to file the [Callahan] affidavit within 15 days" of her meeting with Ryan. From whence the "15 days" is derived neither Cannon nor Landy apparently say, but the Board is unaware of the significance of that particular time period.

[35] Ryan Exceptions at 7.

[36] Cannon Reply at 14.

[37] *Id.*, at 15.

[38] We do not necessarily join the ALJ in this particular regard. Former employees (disgruntled or gruntled) often make the most potent witnesses. *See, e.g., Star Stations of Indiana,* 51 FCC 2d 95 (1975), *aff'd per judgment,* 527 F.2d 853 (D.C. Cir. 1975), *cert. denied,* 425 U.S. 992 (1976). We are not incurious, however, about Callahan's testimony as to WFTI-FM, St. Petersburg, Florida in which he claimed to be an "owner" of that station, *S.I.D.*, para. 41, but proposed to sell that station almost immediately after (or *before*) building it. *Id.*, para. 44; *see also id.*, at n.15. The Mass Media Bureau may wish to investigate Callahan's actions.

[39] At oral argument, the Board pointed out that (had Ryan wished to) Miller could have simply been given non-voting stock in FCCL, which would not have diluted or jeopardized Ryan's 100% ownership integration credit. *See, e.g., Susan S. Mulkey,* 4 FCC Rcd 5520 (1989); *see generally Attribution of Ownership Interests,* 97 FCC 2d 997 (1984), *on reconsideration,* 58 RR 2d 604 (1985); *Anax Broadcasting Inc.*, 87 FCC 2d 483, 488 (1981). It has been long held that non-voting stock does not effect control of a corporation, the vital element in our quantitative integration analyses. *See Evening Star Broadcasting Co.*, 68 FCC 2d 129, 133-136, *recon. denied,* 68 FCC 2d 158 (1978). Yet neither Ryan nor Ryan's counsel offered Miller non-voting stock, however persistent Miller's press for something "tangible." We draw no decisional inference from this failure though to do so; again this would be entirely speculative.

[40] Even in *Linda Crook*, where we had solid and demonstrative evidence of an intent to alienate a percentage of equity, the Board drew no immediate conclusions, but merely remanded for further evidentiary hearing (upon which remand she dismissed her application which had prevailed in the initial hearing).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

UNITED STATES INDEPENDENT CELLULAR TELEPHONE ASSOCIATION — File No. MSD 89-1

For Clarification of Rural Cellular Areas Filing Requirements and for Opportunity to Supplement Applications

and

In re Request of

ROMULUS ENGINEERING

For Notice, Opportunity for Comment, and Issuance of a Declaratory Ruling Regarding FCC Requirements For Initial Cellular Applications in Rural Service Areas

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1990; Released: April 25, 1990

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. On January 26, 1989, the United States Independent Cellular Telephone Association (USICTA) filed a "Request for Clarification of RSA Filing Requirements and for Opportunity to Supplement Applications" (Request). USICTA states that it is an association representing the interests of applicants for non-wireline cellular Rural Service Areas (RSAs). On December 6, 1988, Romulus Engineering (Romulus) filed a "Petition for Declaratory Ruling," and on February 13, 1989, Romulus filed "Comments" regarding certain post-lottery dismissals of applications for construction authorizations in the Domestic Public Cellular Radio Service for RSAs. Romulus states that it is a company whose primary business is the preparation of cellular applications for RSAs.

II. CONTENTIONS OF THE PARTIES

2. In their Request, USICTA requests clarification of the following filing requirements: (1) the requirement of a non-wireline RSA applicant to disclose all partners and their respective interests in the partnership; (2) the requirement of a non-wireline RSA applicant to provide microfiche copies of cellular applications which contain a microfiche of the originally executed signature page; (3) the prohibition against an RSA applicant applying as a general partnership with a general partner(s) who is not a United States citizen and then attempting to amend the application by forming a limited partnership in order to avoid the prohibition against alien ownership; and (4) the prohibition against transfers of ownership interests in a RSA application pursuant to Section 22.922 of the Rules. USICTA further requests that after the Commission has clarified these filing requirements, that lottery winners be afforded a 30-day period in which to file amendments that would enable them to conform their applications to these standards.

3. In their Request for Declaratory Ruling and Comments, Romulus requests clarification of the same filing requirements requested by USICTA. We, therefore, consolidate the above-captioned Requests in this Memorandum Opinion and Order.

III. DISCUSSION AND ORDERING PARAGRAPHS

4. All of the filing requirments which USICTA and Romulus request clarification of are currently the subject of ongoing application proceedings or have been clarifed by Commission decision.[1] For that reason, we are denying the Request for Clarification and Request for Declaratory Ruling as unnecessarily duplicative.

5. Accordingly, IT IS ORDERED that the Request for Clarification filed by United States Independent Cellular Telephone Association and the Request for Declaratory Ruling and Comments filed by Romulus Engineering ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTE

[1] *See e.g., Continental Cellular*, 5 FCC Rcd 691 (1990), *appeal pending sub nom. Continental Cellular v. Federal Communications Commission*, No. 90-1126 (D.C. Cir., filed March 5, 1990) (alien and partnership issues); "Declaratory Ruling Letter" (November 2, 1988) from Gerald P. Vaughan, Deputy Chief, Common Carrier Bureau, to Eric Fishman, Esq. (partnership issues); *MetaComm Cellular Partners*, 4 FCC Rcd 4452 (Com. Car. Bur. 1989) (microfiche issues); *Modoc RSA Limited Partnership*, 4 FCC Rcd 3996 (Mob. Serv. Div. 1989)(transfers of ownership issues).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 25, 1990

ALLTEL CORPORATION FILES PETITION FOR WAIVER OF PART 36 RULES IN ORDER TO CONSOLIDATE THE STUDY AREAS OF THREE WHOLLY-OWNED LOCAL EXCHANGE CARRIERS

(PUBLIC COMMENT INVITED)

On April 9, 1990, Alltel Corporation (Alltel) filed a petition for waiver of certain sections of the Commission's Part 36 Separations Rules and the "study area" definition in order to consolidate the study areas of three of its wholly-owned local exchange carriers (LECs) in conjunction with the merger of those companies. Alltel states that a merger of these three LECs would promote the public interest through more cost effective service.

Parties may file comments on Alltel's petition no later than **May 18, 1990.** Replies should be filed by **June 4, 1990.** Comments should reference AAD 90-14. A copy of each pleading should be sent to Gene Gold, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. A copy of Alltel's petition is available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N. W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Gene Gold, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 19, 1990

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PUERTO RICO TELEPHONE COMPANY'S REQUEST FOR EXTENSION OF TIME TO IMPLEMENT EQUAL ACCESS

On April 6, 1990, Puerto Rico Telephone Company (PRTC) filed a request for a three month extension of time until December 31, 1990, in which to complete the implementation of equal access. PRTC is currently required to complete equal access conversion by September 30, 1990.

In CC Docket No. 86-309, PRTC originally represented that it would implement equal access throughout its service territory by the end of 1989, and the Commission made this a condition of PRTC's entry into the off-island telecommunications markets. *Puerto Rico Order,* 2 FCC Rcd 6600 (1987) at 6607. The Commission subsequently waived PRTC's equal access conversion deadline through September 30, 1990. *PRTC Equal Access Waiver Order,* 5 FCC Rcd 118 (1990).

PRTC emphasizes that it is committed to converting to equal access, but states that several recent developments have resulted in delays. Among these developments, PRTC cites the planned "privatization" of PRTC, threats of substantial labor unrest, unexpected delays in repairing the damage from Hurricane Hugo, the expansion of equal access to include public telephones and cellular telephones, and the off-island carriers' request for additional time to review PRTC's Equal Access Guide. As part of its filing, PRTC provides a schedule of proposed conversion dates for "clusters" of end offices throughout Puerto Rico.

The Puerto Rico Communications Authority (PRCA), the other local exchange telephone company in Puerto Rico, also plans to complete equal access conversion by December 31, 1990. PRTC states that it is authorized to seek an extension of time for PRCA, if the Commission believes that such an extension is necessary.

Interested parties should file comments on this request by **May 17, 1990,** and reply comments by **June 1, 1990,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of PRTC's request can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 89-78

In the Matter of

Inquiry into the Need for
A Universal Encryption Standard
for Satellite Cable Programming

REPORT

Adopted: April 12, 1990 **Released: April 25, 1990**

By the Commission:

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I. INTRODUCTION

1. The Commission undertook this inquiry pursuant to Congressional instructions in the Satellite Home Viewer Act of 1988.[1] Our mandate was to determine "the need for a universal encryption standard that permits decryption of satellite cable programming intended for private viewing." The Act also provides that, if the inquiry establishes that a standard is "necessary and in the public interest," the Commission "shall initiate a Rule Making to establish such a standard."[2] The term "satellite cable programming" is defined in the Communications Act as "video programming which is transmitted via satellite and which is primarily intended for the direct receipt of cable operators for their retransmission to cable subscribers." [3]

2. The Act enumerates the following six factors that the Commission should take into account in its inquiry:

> (1) consumer costs and benefits of any such standard, including consumer investment in equipment in operation;
>
> (2) incorporation of technological enhancements, including advanced television formats;
>
> (3) whether any such standard would effectively prevent present and future unauthorized decryption of satellite cable programming;
>
> (4) the costs and benefits of any such standard on other authorized users of encrypted satellite cable programming, including cable systems and satellite master antenna television systems;
>
> (5) the effect of any such standard on competition in the manufacture of decryption equipment; and
>
> (6) the impact of the time delay associated with the Commission procedures necessary for establishment of such standards.[4]

3. The *Notice* in this proceeding, and prior Commission reports, provide background information regarding the home satellite dish (HSD) programming market.[5] In its earlier general investigation of the HSD market, the Commission concluded that a mandatory encryption standard would not serve the public interest. At that time, the Commission found that the market had settled on the Videocipher II (VC II) system as a *de facto* standard, so consumers were not required to purchase multiple decoders and that a mandatory standard would limit the incentives for innovation in encryption technology. The Commission expressly noted the possibility that a "quantum leap" in technology could occur, whereby an existing encryption system was replaced by one offering substantially higher quality or lower cost.[6]

4. In this inquiry, the Commission undertook a comprehensive reconsideration of the utility of mandatory encryption standards. After careful analysis of the record, we conclude that imposition of mandatory encryption standards at this time would not serve the public interest. The next section of this *Report* contains our analysis, organized by issue and accompanied by a summary of the comments in this proceeding. Our conclusions appear in the third and final section of the *Report*.

II. ANALYSIS AND COMMENT SUMMARY

5. Eighteen institutions or groups filed formal comments in this proceeding and nine filed reply comments.[7] Two of those nine did not file comments. The record also contains roughly 75 comments from individuals and a one-hour tape of opinions from a satellite radio talk show provided by K-SAT.[8] No institutional commenter favors a mandatory standard at this time and most of them strongly oppose it. The individual comments generally advocate

a standard and include complaints regarding General Instrument Corporation (GIC), owner of patents on the VC II technology. The complaints involve the vulnerability of the VC II to theft of services and the proposed introduction of the Videocipher II Plus (VC II Plus), a new generation of decoder, without providing a free upgrade to current legitimate VC II users. In general, these letters provide little or no analysis or information.

6. By and large, the issues of the transition to the VC II Plus and theft of satellite signal services ("unauthorized decryption," colloquially referred to as "piracy") received the most attention from commenters. The following discussion is organized around the six criteria specified in the Satellite Home Viewer Act, with a final subsection devoted to other matters raised by commenters.

7. *Consumer Costs and Benefits of A Mandatory Standard.* Our *Notice* identified four issues under this heading. First, is a standard required to ensure that consumers do not need to purchase multiple decoders? Second, would a standard lead to lower decoder prices? Third, what are the benefits of a standard as "obsolescence insurance?" Fourth, what are the consumer costs of a standard?

8. With respect to to the multiple decoder issue, several commenters reiterated that the VC II remains the *de facto* industry standard.[9] GIC, not surprisingly, concurs in this assessment, stating that there are "fifty-three program services using or signed up to use the Videocipher II system."[10]

9. Two industry developments that have occurred since the record closed in this proceeding are nonetheless relevant. First, a consortium of cable multiple system operators and GE Americom, known as K Prime Partners, has announced plans to use a Ku band satellite in the fixed satellite service to deliver seven superstations and some pay-per-view channels direct to households.[11] The satellite is already in orbit. K Prime Partners' business plan involves leasing receiving equipment, including small dish antennas, to subscribers as part of the program package. Although they have not yet chosen an encryption standard, press reports indicate that K Prime Partners is leaning against the VC II. However, the superstations that the group contemplates delivering are all available to dish owners via C band feeds and the VC II. The pay per view programming that the venture will offer has not yet been determined, but one possibility is Viewers Choice, a service also available to VC II owners via a C band feed. These considerations lead us to conclude that, at this point, K-Prime Partners does not vitiate the status of the Videocipher II as a *de facto* industry standard.

10. Second, Hughes Communications, NBC, Cablevision, and News Corp, Ltd. have just announced plans to launch a high-power, "true DBS" service, called "Sky Cable," in 1993.[12] The service contemplates use of a video compression technology that is still under development. That technology could allow as many as four video channels to be delivered via each satellite transponder. Hughes has a construction permit in the DBS service that could lead to authorization for it to operate 27 transponders. Because the video compression technology itself in essence involves scrambling the signal, the VC II technology would not be applicable to this service.

11. Nevertheless, at this time, we do not consider that the announcement of Sky Cable compromises the status of the VC II as the *de facto* standard. The scheduled launch of the service is three years away and could be later. It is safe to say that there will be many other developments in satellite television (*e.g.*, advanced television, see *infra* at paras. 32-33) in the interim. Moreover, it is not clear what programming will be offered by Sky Cable. Some may duplicate material available via the VC II and C band feeds, since the cable programmers appear to have committed themselves via long term transponder leases to C band delivery for several years to come.[13] We do not rule out the possibility that a time will come when the encryption standards consensus now in operation among satellite cable programmers will break down. However, we do not believe that this consensus will break down in the near future, and, indeed, the substantial benefits to programmers of standardization may well preserve a consensus indefinitely.[14]

12. With regard to the link between a standard and decoder prices, GIC points out that the price of the decoder will depend on the characteristics of the standard chosen. Compared to the VC II, a new standard could result in either higher or lower prices, depending on the characteristics chosen, and in particular, on the key "tradeoff between security and consumer cost."[15] Some commenters who complain about the high price of the VC II appear to believe that, through regulatory intervention (which might include promulgating an encryption standard), the Commission can and should require GIC to change the terms on which it licenses the VC II technology, which would lead to lower decoder prices.[16]

13. These parties provide no analytical estimate of the impact of this on decoder prices, nor do they address GIC's contention, supported by legal analysis, that the Commission has no authority to compel patent licensing on specified terms.[17] Since we have decided on other grounds that a mandatory standard does not serve the public interest, we make no finding on the issue of our authority to regulate the licensing of patents on an encryption system that we have promulgated as a standard.[18]

14. The question of providing obsolescence insurance through setting a standard is more than an academic one. A standard would provide advance warning of system changes and would probably slow the process of change, thus, in some circumstances, prolonging the useful life of consumer decoders. However, it is hard to measure the benefit of this without having particular technical changes to compare it with and without an understanding of the incentives present in the free market system for orderly transition. The VC II Plus, a new generation of decoder, has just been introduced by GIC. While the transition has just begun, it is nevertheless instructive to examine the actions and plans of manufacturers and programmers to assess the effect of the VC II Plus on current decoder owners.

15. Based on information currently available, it appears the the VC II Plus is being introduced in a way that protects the investment of owners of legally-authorized VC II decoders. Those decoder owners will apparently retain access to all programming currently available to them. Moreover, should they wish to upgrade their decoders to VC II Plus capability, GIC has a program to do that at well under the price of new VC II Plus decoding capacity.

16. Our *Notice* (at paras. 14-16) contains a description of the essential features of the VC II Plus. GIC states that this description is "essentially accurate," and that the VC II Plus "is designed to offer additional capacity to service a greater number of subscribers, expanded channel capac-

ity for programming delivery, and advanced system security."[19] The security improvements of the VC II Plus are achieved through the use of a new very large scale integrated (VLSI) microprocessor. By combining security functions that previously were provided by several different chips, GIC believes that it will be more difficult for pirates to penetrate and compromise the security system. The capacity to service more customers is embodied in the higher addressing rate, which will allow the system to send a much greater number of authorization messages to decoders per time period.[20]

17. The expanded channel capacity feature of the VC II Plus is embodied in its 256 "tier bits." These comprise the 56 that are common to the VC II and an additional 200. A tier bit is best understood as an "on-off" switch that controls access to a scrambled channel or group of channels. Programming provided via tier bits 1-56 is available through both VC II and VC II Plus decoders. Programming provided via the other 200 tier bits will be available only to VC II Plus decoders.

18. Because each tier bit can provide access to a package of program services, in principle, the VC II could be utilized by an unlimited number of channels, provided appropriate agreements among programmers regarding packaging could be worked out. While tier bit demand appears to be pushing the capacity of tier bits 1-56, programmers are apparently making arrangements to "double up" on those tier bits.[21] Nevertheless, we expect that at some point, programmers will begin using the upper 200 tier bits. It is this prospect that has raised the major question regarding possible obsolescence of the VC II.

19. Some commenters have suggested that programmers will shift from the VC II tier bits to VC II Plus tier bits and leave those who bought the VC II in good faith without access to programming. The underlying assumption is that the VC II Plus will, in fact, offer adequate protection against piracy and that programmers will "migrate" to the upper tier bits to thwart piracy.

20. Both the statements of manufacturers and programmers and the business interests of those parties suggest that this fear is unfounded. The Satellite Broadcasting and Communications Association (SBCA) concludes that

> Based upon the representations which have been made to the SBCA by our programmer members and by GI, it is clear that owners of the existing Videocipher II will continue to be able to receive all programming services encrypted on the first 56 tier bits.[22]

SBCA provides statements from officials of PrimeTime 24, Netlink, Showtime Satellite Networks, Turner Cable Network Sales, Home Box Office, Eastern Microwave, Satellite Sports Networks, and the Superstar Connection regarding their intentions to continue providing service via the VC II.[23] ESPN is somewhat more equivocal, stating that it does "not believe that the investment of HSD owners in existing decoders can be allowed to stand in the way of finding a solution to the endemic piracy problem through improved encryption technology."[24] Nevertheless, ESPN has given no specific indication that it will abandon the VC II technology. GIC confirms that "it has no intention of allowing existing subscription services to transfer to the higher tier bits."[25]

21. The assurances of programmers and GIC regarding continued use of the VC II are not binding, but they reflect the commercial interests of the relevant parties, who have powerful incentives not to desert the installed customer base of about 637,000 VC II households in favor of what is currently only a handful of VC II Plus owners. Netlink notes the importance for programmers of maintaining access to that customer base even though no individual programmer serves or is likley to serve every single HSD household.[26] GIC estimates that programmers earnings from "legitimate HSD consumers is currently approaching $150 million annually and growing."[27]

22. The tier bit migration scenario is predicated on the assumption that that the VC II Plus will, in fact, prove satisfactorily resistant to piracy. In our judgment, no programmer would find it attractive to move to the upper tier bits until the VC II Plus had established a strong record of resistance to signal theft. We have no basis for estimating the relevant "test period" after which programmers would be convinced of the security of the VC II Plus, but we suspect that it would be at least one year and probably two.

23. Moreover, even if the Plus does remain secure, it will probably be a matter of years before it captures a substantial share of the customer base. *Satellite Business News* estimates that in 1989 276,450 new satellite systems were sold, 25-30 thousand integrated receiver decoders (IRDs) were sold to upgrade existing systems, and 280-300 thousand systems will be sold in 1990.[28] The same publication also estimates that in 1989 the number of legally authorized decoders increased by roughly 162 thousand.[29] Our estimates of the incidence of piracy (see *infra* at para 39.) suggest that the total increase in decoders in the field in 1989 was between 325 and 350 thousand. While predictions of trends in decoder sales cannot be made with precision, it appears that a range of 300-360 thousand is reasonable.[30] Moreover, since there are a large number of VC II units in the distribution pipeline, it is likely that a significant fraction of 1990 sales will be of VC II decoders.

24. These figures suggest that, at the least, it will be close to two years before the VC II Plus pulls even with the VC II among legally authorized subscribers. Even then, we think it unlikely that programmers would leave the VC II for the VC II Plus since, assuming that VC II and VC II Plus subscribers have roughly the same demand for services, this would involve sacrificing 50 percent of the revenues from satellite subscriptions and alienating the most loyal and longstanding segment of the customer base. Cutting off service to a pool of pirate subscribers that is likley to have dwindled due to legal action and electronic countermeasures (see *infra* at paras. 47-48) does not appear to be sufficient motivation for a switch.

25. Nevertheless, if the VC II Plus does remain secure against piracy, the time will probably come when programmers will stop using the VC II system. At that time, however, the number of VC II decoders in use will have declined, and most of those that remain are likely to be relatively old and may be candidates for replacement on other technological grounds.[31] Most of the consumer investment in VC II decoding capacity is likely to have been amortized. Moreover, programmers may well find it in their interest to smooth the transition for their VC II customers.[32]

26. The VC II can be upgraded to VC II Plus capability by replacing a plug-in module. GIC has announced that, for a limited time, it will make such an upgrade for $129 plus $20 for shipping and handling.[33] Decoder owners may also have to pay a service charge to their dealer.[34] This price compares favorably with the price of decoding capacity to first time buyers of VC II Plus decoders. The current wholesale price of VC II Plus modules is $249, although for a limited time orders were accepted at the $180 VC II wholesale price.[35]

27. We have cited (note 32 *supra)* an instance in which a programmer has agreed to finance VC II Plus upgrades for its subscribers.[36] Some commenters suggest that GIC should pay for upgrades.[37] HBO, on the other hand argues that

> Assuming piracy reduction efforts are successful and an upgrade to VC II Plus is not required to solve the security problem, the cost of any voluntary upgrade to VC II Plus should be borne by consumers. The major advantage of VC II Plus is the increased capacity for additional encrypted program services and other enhanced consumer features. If existing VC II users desire access to these additional services and features, then the cost of the equipment necessary to obtain these features and services should be borne by those consumers.[38]

28. The VC II Plus is a new product whose efficacy against signal piracy is unproven. If the upgrade is merely a matter of obtaining additional services, we concur with HBO that there is no justification for any government requirement that programmers, manufacturers, or any other party subsidize consumers' conversion to the VC II Plus. If the VC II Plus does not survive the pirates' onslaught, the issue of conversion will be moot. And, as discussed above at paras. 24-25, if the VC II ends up being phased out in a matter of years, the adjustment costs associated with consumer decoders will be relatively small, not a situation requiring any government intervention with respect to upgrades (which may be paid for by consumers alone or, as suggested at para. 25 *supra*, partially financed by programmers). In summary, then, we believe the concern of NRTC and others that the "American public's *bona fide* investment in legitimate descrambling units must be protected," is adequately addressed by market forces.[39]

29. In its reply comments, NRTC, alone among commenters, criticizes GIC's decision to supply the VC II Plus module as a single unit, rather than in two pieces, one of which would be a "security card" that could be changed as part of ongoing antipiracy efforts.[40] This feature had long been part of the VC II Plus development plan. It is now being held in reserve by GIC. No other commenter identified anything wrong with GIC's current approach, nor has NRTC presented credible evidence to suggest that this change has had any negative effect on manufacturers, programmers, or consumers. Trade press reports suggest that the "pirate underground" is disappointed at this development.[41]

30. Most of the discussion of the impact of a standard on consumers focused on the question of whether the market provides benefits such as obsolescence insurance and relief from the necessity of purchasing more than one decoder. However, there was some comment on the cost to consumers of a standard in terms of innovations discouraged, with commenters generally concurring that consumers benefit from flexibility on the part of equipment providers.[42] In the *Notice*, we asserted (at para. 10) that the self interest of manufacturers and programmers is likely to ensure that changes in encryption technology are "compatible with the original system and/or gradual, so that any incompatible equipment may be amortized. This does not rule out, nor should it, the chance of a quantum leap in technology leading to drastically improved quality or reduced cost." Although we invited comment on this proposition, we received none. We continue to believe that consumers are better served by a system that permits such flexibility and that if a sudden transition to an incompatible technology were ever to occur, it would happen only by introduction of developments conferring substantial consumer benefits.

31. *Advanced Television and Other Technical Enhancements.* Commenters stressed the importance of not constraining advanced television (ATV, which refers to a variety of potential changes in television transmission standards, some mutually exclusive, some not, that would improve picture quality, including "high definition television" systems) developments by setting an encryption standard now. Moreover, linking the satellite encryption standards and ATV issues received little support. Some commenters also noted that the Videocipher technology is not compatible with the ATV systems now under consideration.

32. After characterizing ATV as "the type of technical change that occurs infrequently, and one that is comparable in its significance to the adoption of NTSC," Thomson Consumer Electronics, Inc. asserts that

> The success of the standard ultimately adopted for ATV should not be jeopardized by an incompatible satellite programming encryption standard. Since the Commission has not yet selected the ATV standard, Thomson feels that it is premature to consider the adoption of an encryption standard.[43]

With regard to the compatibility of ATV and Videocipher II technology, HBO notes that "VC II and VC II Plus are not capable of delivering any of the ATV formats proposed to date."[44]

33. GIC points out that the Commission's current ATV proceeding deals with terrestrial broadcasting standards only and asserts that "[I]t is almost certain that the satellite format will differ in some respects from the terrestrial broadcasting format, inasmuch as the two formats differ today."[45] GIC also suggests that it is "unlikely that TV broadcasters will want to encrypt their transmissions."[46] Hence, the suggestion of the American Home Satellite Association (AHSA) to combine the satellite cable encryption standards and ATV proceedings[47] is without merit.

34. Commenters also generally believe that a standard would unnecessarily limit the flexibility of those wishing to introduce new products or services other than ATV. While there is little in the way of specific examples cited, commenters refer to the possibility of new scrambling systems that offer lower cost or increased security. There is also some analysis of new services and distribution media.

35. Thus, while emphasizing programmers' intention not to abandon their VC II customer base, SBCA asserts that if "future developments allow a new programmer to enter the market with a low cost scrambling system, there should not be federal impediments (i.e., a mandated standard) which prevent such entry."[48] HBO, after reiterating its "continued plans to use VC II scrambling technology," suggests that "[I]n the event new encryption technologies are developed in the future, which have demonstrable consumer benefits, the introduction of these benefits should not be stymied by an entrenched government technology that has become inferior."[49] HBO also raises the issue of flexibility in the response to signal piracy, asserting that "if the security of any encryption technology becomes compromised to the extent it is unable to protect programmers' services, the users of that technology must be free to seek a more secure system without government-imposed delay."[50]

36. Several commenters pointed out that the encryption needs of different types of services might differ. ESPN argues that

> different types of satellite programmers have different needs in the ancillary aspects of an encryption system. A pay-per-view programmer may require a very powerful and flexible capacity for addressability. A nonsports programmer such as MTV or Lifetime will not require the capability to make blackouts that an ESPN does. And an ESPN, which emphasizes the sale of annual subscriptions, will not need the same authorization flexibility that a premium programmer marketing monthly subscriptions will desire.[51]

In a similar vein, SBCA urges the Commission not to "preclude the entry of new programming sevices which may require, from an economic standpoint, a simple, inexpensive home descrambler (if such a device is possible)." SBCA cites the example of an HSD service designed to deliver sporting events to Penn State University alumni.[52]

37. Other comments make the same point in a slightly different context. While opposing a standard in general, some commenters assert that even if the Commission were to adopt a standard for satellite cable programming, such standard should not be applied to the DBS service. Hughes states that

> DBS systems may require the use of a new generation of encryption equipment with new features, greater protection for programming and lower per unit hardware costs than exists in the HSD market. Specifically, unlike programming in the HSD market which largely reflects the relatively homogeneous characteristics of cable programming, DBS operators are likely to provide a mixture of program types, including pay-per-view and advanced television (ATV). Each programming type may have different operational and security requirements.[53]

38. A contrary view to the issue of the scope of a standard is provided by Robin Adair. She urges that the Commission not limit itself to satellite cable programming alone, but to set a standard that applies to virtually all satellite transmissions.[54] In addition to opposition to this position from those who urge that DBS be left out, sports interests have filed comments in regard to backhaul and fronthaul feeds of sporting events, noting that they are private communications, not meant for the general public. These commenters, Major League Baseball, the National Basketball Association, and the National Hockey League, counsel the Commission not to include transmissions of this nature in any standard that might be adopted.[55] We agree that different types of satellite transmissions may have different security requirements. Currently, those who transmit video material, not meant for the general public, via satellite may choose their own encryption technology. Nothing in the record of this proceeding suggests that the Commission should alter this situation.

39. *Unauthorized Decryption of Satellite Cable Programming (Piracy).* Theft of satellite services (signal "piracy") continues to be a severe problem for the home satellite dish industry. SBCA asserts that

> Piracy of satellite cable programming by home satellite dish owners has persisted at a level of 50% or more during the past year. If this problem is not brought under control, the industry may not survive.[56]

ESPN estimates that "nearly 60 percent of all decoders sold appear to have been used for piracy," while AHSA puts the incidence at " *as many as 58 %* of the decoders in the marketplace."[57] NRTC suggests that "the incidence of piracy today is easily 60% and informal estimates by industry officials peg it as high as 70 to 80 percent."[58] GIC states that, as of June 1989, 1.4 million modules had been shipped and there were 520,000 units currently authorized. GIC asserts that an additional 300,000 units were "in various categories of transshipment, service, warranty repair, in distribution to wholesalers and retailers, in inventory with IRD manufacturers, in pirate scrap, destroyed or replaced in the repair cycle."[59] Using these figures, and assuming all decoders not otherwise accounted for are in use by pirates, yields a figure of 53 percent piracy.[60] The consensus appears to be that piracy is in the 50-60 percent range.[61]

40. In order to assess the effect of a standard on piracy, it is useful to recall the motivation for piracy. NRTC states that

> The incidence of piracy is a function of numerous factors. Chief among them are the price of decoders and the price of programming.[62]

AHSA concurs in this diagnosis, but appears to consider program prices the larger problem.

> The disease is program price discrimination. As long as satellite dish owners perceive that they are not being offered satellite programming at fair prices, and as long as consumers are required to pay unreasonably high prices for decryption equipment, program piracy may remain a fact of life.[63]

GIC denies that decoder prices are a significant determinant of piracy.[64]

41. Neither NRTC not AHSA present any analysis that would permit assessment of the magnitude of the relationship between decoder prices and piracy. Moreover, no commenter satisfactorily addresses the issue of the relationship between decoder prices and a mandatory standard. GIC points out that adoption of a standard could raise or lower decoder prices, depending on the characteristics of the standard chosen.[65] Some commenters (see *supra* at paras. 12-13 and *infra* at paras. 51-56) seem to assume that, if a standard were chosen, it would be the VC II and its choice would be accompanied by some sort of compulsory licensing scheme that would reduce royalties. Here again, there is no attempt to describe the magnitude of the effect on decoder prices and no challenge to GIC's legal analysis and assertion that the Commission does not have the authority to compel patent licensing on specified terms.[66]

42. We do not believe that a standard would reduce the incidence of piracy. While we posited a link between decoder prices and piracy in the *Notice*, upon reflection we believe that, given the current state of pirate technology, a fall in decoder prices would *not* reduce and could even increase piracy. The reason for this is that, currently, to receive programming without authorization, it is necessary to have a VC II decoder. Piracy involves altering or interacting with such a decoder. Hence, every pirate must buy one and a reduction in price, by reducing the price of one "input" into the pirating process, might actually increase piracy. While the direction of this effect is clear, its magnitude is uncertain. We suspect that the magnitude is small.

43. A related point is made by GIC, which suggests that roughly one half of the pirate decoders are located in Canada, Mexico, and the Caribbean. [67] Many American program services are not legally available in those areas due to copyright restrictions. Hence, even if decoders were free, dish owners in those areas would still be unable to subscribe legally to many services. The impact of decoder prices on piracy is therefore particularly small in the case of foreign pirates.

44. Many commenters also assert that a mandatory standard would actually impair the efforts to combat theft of satellite services. SBCA states that

> The obvious effect of a mandated standard is that it could impair the ability of the industry to adjust and react as those engaged in signal theft assault the system . . . Future adjustments may be necessary and the Commission should not impede the industry's ability to take such steps as are necessary to provide enhanced system security. The establishment of a standard would clearly impair the flexibility needed to respond to piracy.[68]

ESPN states that

> a mandated standard would stifle the innovation and practical experimentation needed before encryption systems that will strike the right balance between cost and reliability can be found. It would further make it impossible to make the rapid changes which would be needed if the system(s) of choice were defeated.[69]

45. Several commenters assert that the process of adopting a standard would involve public disclosure of information that would likely compromise system security. For example, Major League Baseball claims that a standard would make it "difficult (if not impossible) for the Commission to prevent release of the very information that will help compromise security of the system."[70]

46. GIC makes the related argument that, if a standard were to lead to a substantial increase in the number of manufacturers of encryption equipment, it would be "virtually impossible" to develop and maintain a secure system.[71] GIC asserts the importance of limiting the number of persons with access to the system and outlines a scenario in which manufacuturers "pursuing cost reduction techniques would run the risk of implementing designs that were physically insecure," noting that if "any one manufacturer's design were insecure, the entire system might be compromised."[72] GIC refers to the "significant costs in equipment and procedures to meet necessary security standards" incurred by Channel Master, its second source licensee for VC II modules. These considerations lead GIC to suggest that there are good business and policy reasons for limiting the number of manufacturers of decoding equipment.

47. A few commenters address the incentives of private parties to fight piracy and review industry efforts in this regard. For example, HBO

> submits that efforts to eliminate the piracy problem should be left to private industry with assistance from the criminal investigatory and prosecutorial arms of the government. The most effective methods are: (1) aggressive civil and criminal litigation against pirates; (2) continued improvement in system security by manufacturers; and (3) more frequent and aggressive use of electronic countermeasures ("ECM") than has heretofore been the case.[73]

GIC and HBO both assert that some progress is being made in the struggle against signal theft, although neither claim victory.[74] These assertions are based in part on data for the latter part of 1989 showing increased "net authorizations" of decoders. The net authorization figure is the number of newly authorized decoders less the number of decoders turned off for a particular time period. Some support for this interpretation of net authorization figures is contained in an independent trade publication, which, in discussing the last five months of 1989, notes that

> Not only did new VC II authorizations average slightly more than 32,000 a month for the five month period, but net authorizations . . . averaged slightly more than 19,000 each month. Those figures represented a major increase for GI in its fight against piracy[75]

48. HBO suggests that both programmers and "encryption system providers" have incentives to combat signal theft, noting that piracy deprives programmers of revenues and that programmers will not use an encryption system that is compromised.[76] This is essentially true, although the economic, technical, and logistical problems of shifting from one standard to another, incompatible, one suggest that, while abandoning a

system is a possibility, programmers will do so only in extreme circumstances and are likely to give the manufacturer substantial leeway in responding to piracy.[77]

49. GIC asserts that it "would be a major beneficiary of the reduction in piracy.[78] One explanation for this claim that we find persuasive is that the demand for encryption services is growing, both here and abroad. GIC's participation in these potentially lucrative markets (*e.g.*, DBS in the United States and in Britain and Japan among other places) would be jeopardized by continuing failure to deliver security in the home satellite market in the U.S.[79] Thus, while a mandatory encryption standard would not reduce piracy, there are significant incentives for private parties to take actions to combat it.

50. *Costs and Benefits of a Standard for Other Authorized Users.* Only one commenter even mentioned this explicitly, and its discussion was couched wholly in terms of consumers.[80] Robin Adair, in advocating a standard that would apply to all media (cable, at the subscriber's television receiver, MMDS, HSD, etc.) suggests that the resulting decoder would be less expensive.[81] Presumably, this would benefit other authorized users as well as HSD consumers. By and large, we believe that the governing considerations here are the same as in the consumer case, so we conclude that these users, too, would not be well served by a mandatory standard.

51. *Competition in the Manufacture of Decryption Equipment.* Various commenters complain about what they see as limited competition in the Videocipher II decoder market.[82] However, no institutional commenter suggests that a standard *per se* would increase competition. Some individuals assert that a standard would lead to increased competition in decoder manufacture and lower decoder prices. For example, Russell R. Moore argues that

> A new standard would allow other companies to get into the marketplace and create competition that could do nothing but benefit consumers. Lowering the price of the decoder would create more consumer acceptance . . .[83]

These commenters do not address the question of cost levels for decoder technology. While claims have been made that a secure decoder could be produced for much less than the VC II, no evidence or analysis has been presented to support them and they must be considered mere speculation. [84] GIC notes, quite properly, that the cost of a decoder depends on the particular characteristics embodied in it and a different encryption technology than VC II (*e.g.*, VC I) could yield higher decoder prices.[85]

52. Assuming that a standard contains proprietary technology, the amount of competition depends on the licensing practices of the patent holder(s). NRTC and AHSA suggest that, directly or indirectly, the Commission should regulate those practices with respect to GIC and Videocipher. GIC and SBCA contest the Commission's authority to compel patent licensing.[86] Individuals who support a standard generally do not address the issue of proprietary technology.[87] We take no position on the legal issue since we have concluded that a standard would not serve the public interest and that the specific complaints of NRTC and AHSA require no regulatory intervention (see *infra* at paras 61-68).

53. GIC asserts that, in fact, it licenses Videocipher II technology widely. It notes that there are 22 IRD licensees and that Channel Master is a second source licensee for Videocipher II modules.[88] The IRD licensees do not compete in the provision of decoding capacity, since they use identical modules. However, they compete in a limited sense with respect to the markup they add to the module price and the tooling costs they incur to insert the module into their IRD assemblies. It is also worth noting that the dish owner is not limited in the choice of satellite receivers generally by GIC's licensing practices, and we assume that there is substantial competition in the overall satellite receiver market among the 22 licensees and, perhaps, other providers too.

54. IRD licensees can purchase the VC II module from either GIC or Channel Master. Competition here is limited by the fact that Channel Master must purchase certain proprietary chips from GIC. In essence, then, Channel Master can compete with GIC on the value added in fabricating modules from those and other components.

55. Two commenters that are themselves involved in developing alternative encryption systems, NEC Home Electronics and Payview, focus on another aspect of competition. The discussion above relates to competition in the provision of equipment for one particular encryption system. These commenters urge against a standard on the grounds that it would inhibit competition among systems. Thus, even if it were true that a standard increased competition in the manufacture of a given system, consumers might still benefit more from an environment in which manufacturers of rival systems could easily enter the market. As NEC phrases it competition would be better served by refusing to establish an encryption standard and by allowing the market to operate freely . . . a scrambling standard mandated by the FCC would make it much more difficult for new competitors to enter the market because the standard would prevent them from offering innovative products to compete against VC II and similar systems.[89]

56. We conclude that the effect of a standard on competition in the manufacture of decoding equipment is ambiguous. Moreover, we find that VC II equipment is widely available and that nothing in the record of this proceeding provides grounds to question the workings of our nation's constitutionally provided for patent system in this market.

57. *Impact of the Time Delay Associated with Commission Standard Setting Procedures.* With respect to time delay there are two issues--the effect and the duration. Commenters who addressed these issues generally agreed that the delay associated with a standards setting proceeding would have a significant effect. Those who attempted to estimate the duration of the delay came up with figures measured in years rather than months.

58. With regard to the duration of delay, GIC presents a list of 10 "recent FCC technical standards proceedings," for which it claims that the adoption time for standards ranged from five to 15 years. GIC estimates that it would take "three to five years or longer for the Commission to adopt an encryption standard."[90] HBO suggests that "at a minimum, it would take approximately two years for the Commission to conclude an encryption standard proceeding."[91] Netlink estimates that the process would require "several years" and observes that, even after the Commission has made its choice, a court challenge is likely.[92]

59. There is widespread agreement among commenters that the industry would be adversely affected by a period of uncertainty during a standard setting proceeding. Consumers would be reluctant to purchase HSD equipment and manufacturers might stop producing decoders for the "old" Videocipher II standard, thus preventing consumers from gaining access to scrambled programming via satellite dish.[93] GIC suggests that, while an encryption standards Rule Making was in progress, "[C]onsumers would be reluctant to buy new descramblers and IRDs because such an investment might be lost pending the outcome of the Rule Making" and concludes that such a proceeding "would chill the equipment market, resulting in extreme financial harm for numerous manufacturers, distributors and retailers."[94]

60. Netlink and GIC also suggest that the uncertainty would affect programmers. While programmers that have already scrambled their signals would continue to do so, suggests GIC, "new programmers, who must invest in uplink scrambling equipment and business computers for billing and administration, are unlikely to begin scrambling because of the uncertainty and likelihood that their investment would be lost."[95] Netlink makes the same basic argument, but concludes that prospective providers of new services would simply delay launching them "until new equipment was made available."[96] While it is not clear that equipment would be unavailable, it is likely, as GIC suggests, that programmers would not invest in it in such an uncertain environment. To the extent that the inability to encrypt the service and glean the subscription revenue that encryption allows makes the service uneconomical, then consumers will be deprived of access to some programming that otherwise would have been available.

61. *Other Matters* Two commenters, the American Home Satellite Association (AHSA) and the National Rural Telecommunications Cooperative (NRTC), complain about the licensing and marketing practices of GIC. Neither advocate a mandatory standard, at least at this point.

62. While NRTC does not argue that "a universal encryption standard must be mandated by the Commission at this time," it does urge the Commission to "exercise appropriate regulatory oversight over GIC, as the sole provider of encryption technology to the HSD market." NRTC lists a number of commercial practices of GIC to which it objects and requests the Commission to "obtain all relevant data regarding GIC's past conduct and future plans," asserting that "[O]nly with complete and detailed information in hand can the Commission determine whether a universal encryption standard is necessary, or whether other regulatory responses may be appropriate to ensure that HSD consumers have full and fair access to a diversity of satellite delivered video programming."[97]

63. NRTC's complaints all stress the status of GIC as the "sole provider of encryption technology to the HSD market." In other words, NRTC is raising the issue of whether GIC is somehow misusing the legal, government-granted monopoly embodied in its VC II patents. Its position as "sole provider" stems, of course, not from its patent monopoly *per se*, but from the choice of satellite cable programmers to use the VC II system. There are other systems available and in development to which programmers could turn if they wished. However, as discussed *supra* at paras. 20-27 and 48, their private business interests dictate that abandonment of a standard not be done lightly.

64. In general, NRTC's complaints reflect the type of tensions and disagreements likely to arise between firms that are in part rivals and in part in a buyer-supplier relationship. The issues raised include a dispute over terms of an IRD license for NRTC,[98] the price of standalone decoders offered by GIC,[99] various matters relating to GIC module distribution practices, the operation of the DBS Authorization Center, and others. None of them bear directly on the question of whether or not a standard is in the public interest. Moreover, much of the information NRTC asks the Commission to obtain from GIC is already publicly available, while there are sound commercial and policy reasons for GIC's reluctance to provide certain other information (*e.g.*, the criteria they use for targeting suspected pirate decoders for electronic countermeasures--information that would be invaluable to pirates).

65. Moreover, none of NRTC's specific complaints have a nexus with its expressed concern that "consumers have full and fair access to a diversity of satellite delivered video programming." In fact, dish owners have easy access to the full range of satellite cable programming. There may be *bona fide* issues regarding the price of programming paid by dish owners, but they are being adequately addressed in other Commission proceedings.[100] Likewise, while during the past three years, there have been temporary shortages of decoders, by and large they are available to all who want them and we have no reason to believe that this situation will change. While GIC exercises control over the production of VC II decoders, pursuant to its legal patent monopoly, decoder modules are available to 22 licensees, so consumers can choose their decoder-equipped satellite receiver from a multitude of sources. The whole purpose of the patent system is to allow the patent holder to reap profits to provide an incentive for innovation. Hence, the fact that licensees would prefer lower rates or different license terms does not, in and of itself raise public interest concerns.

66. Therefore, we decline to take the additional steps advocated by NRTC. Nevertheless, should clear evidence that GIC is abusing its patent position come to our attention, we would at that time turn to the question of our jurisdiction and, if appropriate, the factual and policy questions involved. We stress, however, that patent law allows patent holders wide discretion in the exploitation of those patents, so claims of abuse have a high but not insurmountable hurdle to overcome.[101] Moreover, such claims, to be credible, must relate GIC's behavior to some significant harm to the public interest.

67. In addition to advocating that this proceeding be combined with the ATV standards proceeding, AHSA suggests that the FCC prohibit scrambling unless the owner of the encryption system 1) licenses more than one additional manufacturer of "all facets of the hardware incorporating its encryption technology;" 2) does not require other manufacturers of decoders using its technology to buy "any hardware from it or its licensees beyond that minimally necessary to incorporate its encryption technology;" and 3) agrees not to modify its technology in such a manner as to make consumer decoders "inoperable" unless the owner of the encryption technology pays for an upgrade of all consumer decoders.[102]

68. The criteria that AHSA suggests are subject to varying interpretation, and the third one in particular seems quite onerous. The patent system is designed to provide rewards to innovation and these conditions would likely discourage providers from stepping forward. Moreover, we have concluded that market incentives appear to provide legitimate owners of VC II decoders with adequate obsolescence insurance. We have further concluded that VC II technology is widely available. In the absence of any showing of the magnitude of any benefits flowing from its proposal, and in deference to the sound principles underlying patent law, we decline to adopt AHSA's proposal or to address our jurisdiction in connection therewith.

III. CONCLUSIONS

69. After a thorough reconsideration of the relevant issues, we conclude that the public interest would not be served by a mandatory encryption standard for satellite cable programming. We wish to stress that we are *not* asserting that the HSD marketplace in general, or the encryption system portion of it in particular, are functioning perfectly.[103] We are not passing judgment on the business plans of GIC, its critics, or any other entities involved in the HSD business. The focus of this inquiry has been on whether a mandatory encryption standard would serve the public interest and we have decided that it would not.

70. Our examination of the record convinces us that the VC II system remains the *de facto* industry standard, so consumers need not purchase multiple decoders. We are cognizant of various developments on the horizon that might lead to the introduction of alternative encryption systems, either alongside of or in place of the VC II in years to come. We do not rule out the possibility that, at some point, the consensus on encryption standards may break down in a way that imposes unacceptable burdens on consumers. However, that day is not at hand, and we do not wish to constrain the development of new services and technologies by adopting a satellite cable programming encryption standard at a time when one system is so widely used by programmers.

71. We continue to believe that theft of satellite services, so-called signal piracy is the single biggest problem facing the industry. It is a matter so serious that failure to bring it under control could threaten the future of direct-to-home transmissions. These high stakes provide substantial incentives to industry participants, manufacturers, programmers, dealers, and others, to combat piracy. The new VC II Plus decoder is one part of the anti-piracy battle. While it is too early to say that the VC II Plus will, in fact, stem the tide of piracy, we are convinced that its introduction will not obsolete legally-authorized VC II decoders. Moreover, we are convinced that a Commission standard-setting proceeding would be protracted, would diminish industry incentives to combat piracy, and could compromise the integrity of the standard adopted.

72. The record in this proceeding suggests that the effect of a standard on decoder costs and competition in the manufacture of decoders cannot be determined without knowledge of certain key aspects of the technology chosen. Decoder costs depend on the particular characteristics of the standard chosen. Competition depends on the licensing practices of the owners of patents on the technology. The security requirements associated with the manufacture of encryption equipment may militate against widespread production of key components. In any event, the costs of a standard in terms of limiting innovation incentives and possible compromise of anti-piracy efforts are compelling arguments against a standard. Moreover, VC II equipment is, in fact, widely available and there appears to be substantial competition in the manufacture of the satellite receivers of which decoding capacity is a part.

73. As the products and technologies of the future, such as advanced television, DBS, digital compression technology, and others, come to the home satellite market, there will undoubtedly be demand for new and different receiving equipment. The demand for and supply of encryption services will, concomitantly, evolve. The Videocipher II system, widely used today, will not last forever. It is premature to speculate on the system or systems of the future, let alone the identity or conduct of the relevant manufacturers. Nevertheless, we see the demand for encryption services in the HSD and other markets growing over time. Developments with respect to encryption technology will certainly not be ignored by the Commission. Nor will we ignore evidence of abuse of their position by owners of any proprietary technology used in the encryption of satellite cable programming.

74. Accordingly, IT IS ORDERED, THAT this proceeding on the need for a universal encryption standard for satellite cable programming is TERMINATED.

75. IT IS FURTHER ORDERED, THAT the Secretary SHALL FORWARD copies of this *Report* to the appropriate Committees and Subcommittees of the House of Representatives and the Senate.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Institutional Comments and Reply Comments in General Docket No. 89-78

Commenters

American Home Satellite Association
ESPN
GE Americom
General Instrument Corporation
Home Box Office
Hughes Communications Galaxy
Motion Picture Association of America
National Basketball Association/National Hockey League
National Cable Television Association
National Rural Telecommunications Cooperative
NEC Home Electronics
Netlink
North American Philips

Satellite Broadcasting and Communications Association
Satellite Viewers Network
Superstar Connection
Thomson Consumer Electronics
United States Satellite Broadcasting

Reply Commenters

American Home Satellite Association
General Instrument Corporation
Home Box Office
Major League Baseball
National Cable Television Association
National Rural Telecommunications Cooperative
NEC Home Electronics
Netlink
Payview, Ltd.

FOOTNOTES

[1] Pub. L. No. 100-667, 102 Stat. 3949-59 (1988), codified at 47 U.S.C. 605(f), (g).

[2] *Id.*

[3] 47 U.S.C. 605(c)(1).

[4] 47 U.S.C. 605(f).

[5] *Notice of Inquiry* in Gen. Docket No. 89-78, 4 FCC Rcd. 3479 (1989) (*Notice*). *Report* in Gen. Docket No. 86-336, 2 FCC Rcd. 1669 (1987) (*Scrambling Report*). *Second Report* in Gen. Docket No. 86-336, 3 FCC Rcd. 1202 (1988) (*Second Scrambling Report*).

[6] *Notice* at paras. 9-10.

[7] A list of institutional commenters appears in the Appendix to this *Report*.

[8] Most of the comments from individuals are brief letters, but a few are extensive.

[9] Comments of Home Box Office, Inc. at 2 (filed June 19, 1989) (*HBO Comments*), Comments of Netlink USA at 2 (filed June 19, 1989) (*Netlink Comments*), Comments of the Superstar Connection at 2 (filed June 19, 1989) (*Superstar Connection Comments*), Comments of the National Cable Television Association, Inc. at 2-3 (filed June 19, 1989) (*NCTA Comments*), Comments of the Satellite Broadcasting and Communications Association at 4 (filed June 19, 1989) (*SBCA Comments*).

[10] Reply Comments of General Instrument Corporation at 26 (filed July 19, 1989) (*GIC Reply Comments*). *See also* Comments of General Instrument Corporation at 3, 6 (filed June 19, 1989) (*GIC Comments*).

[11] *Satellite Business News*, Feb. 21, 1990, pp. 1, 21.

[12] *Satellite Business News*, Mar. 7, 1990, pp. 1, 22.

[13] *Communications Daily*, Feb. 22, 1989, pp. 1-2; Mar. 20, 1989, pp. 2-3. *See also Satellite Business News*, Mar. 7, 1990, p. 10.

[14] One commenter, Robin Adair, disputes the conclusion that the VC II is a *de facto* standard, claiming that there are five systems in use by satellite cable programmers. Comments of Robin Adair at 24 (filed June 10, 1989) (*Adair Comments*). However, Adair's list of programming encrypted under other systems includes network feeds and baseball backhaul feeds, which the programmers do not offer to home subscribers. Other examples cited by Adair are services that have been discussed in the trade press but not launched. Some of the technologies cited are designed for cable or terrestrial broadcast services; their applicability to satellite service is unclear. The only programs cited by Adair that comes close to meeting the statutory definition of satellite cable programming are "Wrestlemania," an annual event staged by the World Wrestling Federation, and the Tyson-Spinks championship boxing match. Wrestlemania is one of several pay-per-view events put on each year by the WWF. Historically, the other events have been offered to the HSD community. WWF recently announced that the next Wrestlemania will, in fact be offered to dish owners. In the past, certain individual events, for which willingness to pay is high (many are primarily exhibited on a closed circuit basis in theaters and sports arenas), have not been scrambled with the VC II system and not offered to dish owners. It appears that this practice has been motivated by fear of theft of signal services. While some events may continue to be offered outside the VC II system, this phenomenon is *de minimis* and not an indication that VC II is not a *de facto* standard.

[15] *GIC Comments* at 56-59, 52. A few commenters suggested that decoder prices could be as low as $200, but provided no source or analysis to support such speculation. *See, e.g.*, Comments of Satellite Viewer's Network at 2-3 (filed June 15, 1989).

[16] Comments of the National Rural Telecommunications Cooperative at 19-23, 29-30 (filed June 19, 1989) (*NRTC Comments*), Reply Comments of the National Rural Telecommunications Cooperative at 16, 19-20 (filed July 19, 1989) (*NRTC Reply Comments*), Comments of the American Home Satellite Asociation at 8-10, 17-19 (filed June 16, 1989) (*AHSA Comments*).

[17] *GIC Comments* at 62-75.

[18] *See* also the related discussion at paras. 51-56 *infra* on the issue of competition in the manufacture of decoders.

[19] *GIC Comments* at 33. GIC also lists the following additional feature of the Videocipher II Plus: improved on-screen displays, three 9600 baud auxiliary data channels, and enhanced pay-per-view capabilities. *Id.* at 34. For its own general discussion of the VC II Plus, see *GIC Comments* at 33-40.

[20] As explained in the *Notice* at para. 15, this feature is useful for servicing more customers and/or improving the reliability of the monthly decoder reauthorization process for existing customers. The VC II Plus achieves this extra capacity by using a different part of the video signal for reauthorization messages than the VC II uses. Hence, GIC officials point out, it is possible for the same satellite video signal to include both a VC II and a VC II Plus data authorization stream. In other words, the same satellite signal can provide service to consumers with VC II and VC II Plus decoders.

[21] *GIC Comments* at 36-37. *Satellite Business News*, Nov. 29, 1989, p. 4; Feb. 7, 1990, p. 6. For additional information on tier bit usage, see *Satellite Business News*, May 17, 1989, p. 1.

[22] *SBCA Comments* at 7.

[23] *SBCA Comments* at Exhibit C. *See* also *Netlink Comments* at 3-4 and *HBO Comments* at 5-7 (including a statement that, along with HBO and Cinemax, the new HBO comedy service will be provided on the lower tier bits).

[24] Comments of ESPN, Inc. at 3-4 (filed June 16, 1989) (*ESPN Comments*).

[25] *GIC Comments* at 38, note 49. *See* also *SBCA Comments* at 6 and Exhibit C. GIC's control of the DBS Authorization Center used by all programmers who employ the VC II system lends credibility to its statement. However, we have no knowledge of the actual terms of the contracts between GIC and the programmers that govern use of the DBS Center.

[26] *Netlink Comments* at 3-4, esp. note 2.

[27] *GIC Comments* at 37. HBO notes that "[T]o transfer existing services would require HBO to abandon an installed base of more than 300,000 HBO/Cinemax subscriptions and suffer a significant adverse economic impact." *HBO Comments* at 7. ESPN states that it serves over 250,000 HSD households. *ESPN Comments* at 3.

[28] *Satellite Business News*. Jan. 24, 1990, p. 9. An IRD is a satellite receiver with built-in decoding capacity. By contrast, a "standalone" decoder is one that is used in conjunction with an existing satellite receiver that does not itself have decoding capacity. The demand for standalone decoders appears to be a small and dwindling fraction of total VC II demand. However, GIC asserts that [S]tand-alone descramblers with VC II Plus modules will be manufactured and sold as long as legitimate consumer demand justifies continued support of the units." *Videocipher II Plus* (a GIC newsletter), Dec. 20, 1989, p. 2.

[29] *Id.* Jan. 10, 1990, p. 22.

[30] *See* also *Satellite Business News*, Jan. 24, 1990, p. 33 for a statement that GIC "plans to produce more than 30,000 [VC II Plus modules] each month in anticipation of increased demand due to VC II Plus upgrade programs."

[31] One satellite dealer estimates that "technological depreciation" for satellite equipment occurs in three to five years. *Adair Comments* at 14.

[32] This could be done by, for example, defraying part of the customer's cost of conversion to the VC II Plus, perhaps in conjunction with a subscription renewal. One Canadian satellite cable programmer has announced plans to provide free upgrades to VC II Plus capability for its customers. *See Satellite Business News*, Sept. 6, 1989, p. 25.

[33] *GIC Reply Comments* at 27. *See* also *Satellite Business News*, Feb. 7, 1990, p. 7. The upgrade offer is for a period beginning on April 2, 1990. The duration of the offer has not been formally announced, but GIC officials indicate that initially it will last for one year and express willingness to extend it. While HSD systems can vary substantially in cost, many are available in the $1500-$2000 range. *See, e.g.*, GIC Comments at 56. Systems outside that range tend to cost more rather than less.

[34] Satellite dealer Robin Adair offers an illustrative bill of $50.50 for a service call and one hour of labor. *Adair Comments* at 19.

[35] *Satellite Business News*, Oct. 4, 1989, pp. 1, 26. *Inside TVRO* (a GIC newsletter for satellite dealers) July 1989, p. 2.

[36] Our earlier scrambling inquiry disclosed numerous instances of programmers selling decoders at reduced rates in conjunction with subscriptions to a service or package of services. *See Scrambling Report, supra* note 5, at para. 38.

[37] *See, e.g., AHSA Comments* at 18.

[38] *HBO Comments* at 7. *See* also Comments of the Motion Picture Association of America, Inc. at 5 (filed June 19, 1989) (*MPAA Comments*).

[39] *NRTC Reply Comments* at iii.

[40] *NRTC Reply Comments* at 7-16.

[41] *Satellite Business News*, Sept. 6, 1989, p. 3.

[42] *See HBO Comments* at 6, *Netlink Comments* at 5, *Superstar Connection Comments* at 2, *MPAA Comments* at 3, *GIC Comments* at 40-43, Reply Comments of Major League Baseball at 5 (filed July 19, 1989) (*MLB Reply Comments*), Reply Comments of the National Cable Television Association, Inc. at 6 (filed July 19, 1989) (*NCTA Reply Comments*), Reply Comments of NEC Home Electronics (U.S.A.) Inc. at 5-6 (filed July 19, 1989) (*NEC Reply Comments*). Some commenters who stressed the consumer benefits of flexibility to innovate on the part of encryption system providers cite the VC II Plus as a flexibility success story. *See MLB Reply Comments* at 5, Comments of United States Satellite Broadcasting Co., Inc. at 5 (filed June 19, 1989) (*USSB Comments*), Comments of NEC Home Electronics (U.S.A.) Inc. at 4 (filed June 19, 1989) (*NEC Comments*).

[43] Comments of Thomson Consumer Electronics, Inc. at 4 (filed June 12, 1989). *See* also *USSB Comments* at 4 ("the selection of an encryption system would pre-determine the format in which a television signal would be transmitted . . . Under no circumstances should the selection of an encryption standard for ATV preceed the selection of an ATV transmission format."), *GIC Comments* at 55 ("ATV is the type of change that happens only once every 20-40 years"), and *SBCA Comments* at 9 ("the Commission could inadvertantly preclude the delivery of HDTV and other forms of advanced television from direct broadcast satellite service if, prior to that time, a noncompatible encryption standard is established.")

[44] *HBO Comments* at 8. *See* also Comments of North American Philips Corporation at 7 (filed June 19, 1989) (Videocipher "has never . . . been claimed to be capable of accommodating ATV signals") and *ESPN Comments* at 5.

[45] *GIC Comments* at 53. *See* also *HBO Comments* at 8 (Commission proceeding is "focusing on terrestrial broadcast television, not delivery of video programming by satellite." "Since the ATV formats used by broadcast television and satellites are likely to be different, the consideration of datellite scrambling standards should not be tied to the Commission's current consideration of technical standards for ATV service.").

[46] *GIC Reply Comments* at 11.

[47] *AHSA Comments* at 16-17.

[48] *SBCA Comments* at 10.

[49] *HBO Comments* at 6.

[50] *HBO Comments* at 6. See also *ESPN Comments* at 8 (a standard would "make it impossible to make the rapid changes which would be needed if the system(s) of choice were defeated.")

[51] *ESPN Comments* at 7.

[52] *SBCA Comments* at 10.

[53] Comments of Huges Communications Galaxy, Inc. at 2 (filed June 19, 1989). See also *USSB Comments* at 6-7, *SBCA Comments* at 11 (limit any standard to "the present C band market"), and *MPAA Comments* at 4 (any standard "should apply only to the current generation of C band satellites and not to future distribution methods such as Ku-band satellites").

[54] *Adair Comments* at 44-45.

[55] Comments of the National Basketball Association and the National Hockey League at 1-3 (filed June 16, 1989) and *MLB Reply Comments* at 5-7.

[56] *SBCA Comments* at 11.

[57] *ESPN Comments* at 4. *AHSA Comments* at 7. The industry generally expresses piracy in terms of the fraction of decoders in use that have been altered. The majority of home satellite dish systems currently have no decoder at all.

[58] *NRTC Comments* at 12.

[59] *GIC Comments* at 13-14.

[60] The calculation is as follows: 1.4 million less 520,000 authorized decoders less 300,000 decoders otherwise accounted for leaves 580,000 "pirate susceptible" decoders; 580,000/(520,000 + 580,000) = 53 percent. Without explaining why, GIC uses a figure of "approximately 500,000" pirate susceptible decoders instead of 580,000. *GIC Comments* at 14.

[61] Given the figures on legally authorized decoders, NRTC's 70 to 80 percent incidence of piracy seems too high. NRTC notes that "a sizeable portion" of the legally authorized decod-

ers, by using the "three musketeers" technique for signal theft, "could actually be receiving most or all scrambled programs illegally, at the cost of a single program authorization." *NRTC Comments* at 12. No one (including GIC) knows for sure how many decoders are in this category, but they would have to be in the hundreds of thousands to yield a piracy level of 70 to 80 percent. This is unlikely. Moreover, GIC officials assert that the incidence of "three musketeers" piracy is less significant than NRTC claims it is. GIC officials also note that, as of December 31, 1989, there were 637,000 authorized decoders, 1.75 million modules shipped, and 375,000 in inventory, distribution, or otherwise accounted for. These figures yield a piracy rate of 54 percent, *i.e.*, (1.75 million - 637,000 - 375,000)/(1.75 million - 375,000) = 0.54.

[62] *NRTC Comments* at 12

[63] *AHSA Comments* at ii, 15.

[64] *GIC Comments* at 44.

[65] *GIC Comments* at 56-59. GIC notes that its Videocipher I system "is more expensive and secure than the VC II." *Id.*, at 29. Earlier estimates place the retail price of the Videocipher I decoder at $3500. *Scrambling Report, supra* note 5, at paras. 29-30.

[66] *GIC Comments* at 62-75. Since we have determined that a standard does not serve the public interest, we make no finding regarding Commission authority *vis a vis* licensing.

[67] *GIC Comments* at 14.

[68] *SBCA Comments* at 11. After referring to its Antipiracy Task Force, SBCA suggests that "during the pendency of a standards proceeding the motivation to invest in the anti-piracy campaign will be greatly diminished." *See also Superstar Connection Comments* at 2, MLB Reply Comments at 4-5, *NCTA Comments* at 8, *GIC Comments* at 4.

[69] *ESPN Comments* at 7-8.

[70] Major League Baseball goes on to assert that "[T]he more information available about the system, the less secure the system will be; piracy will be made easier and its incidence more likely to increase." *See MLB Reply Comments* at 4. *See also HBO Comments* at 9, *SBCA Comments* at 12, *NCTA Reply Comments* at 2, *GIC Comments* at 47-50.

[71] *GIC Comments* at 45-47.

[72] *Id. See also HBO Comments* at 10 (attempts to reduce decoder prices pursuant to a mandatory standard "could lead to an inexpensive piece of hardware, built to standard, but with very few defenses against compromise.")

[73] *HBO Comments* at 10. *See also SBCA Comments* at 12, *GIC Comments* at 14-17 (detailing its efforts and summarizing the efforts of law enforcement personnel and industry groups).

[74] *GIC Comments* at 19-20. *HBO Comments* at 11.

[75] *Satellite Business News*. Jan. 24, 1990, p. 10. However, the monthly figures for January and February 1990 are lower than the averages for the last five months of 1989. *See Satellite Business News*, Mar. 21, 1990, pp. 1, 21.

[76] *HBO Comments* at 10. ESPN estimates its losses to piracy at $16 million per year. *ESPN Comments* at 7.

[77] There are apparently some intermediate steps available. The preparation of a request for proposals for an alternative scrambling system by HBO and ESPN most likely served to pressure GIC to step up its efforts. *Satellite Times*, July 27, 1988, p. 1.

[78] *GIC Comments* at 43-44.

[79] GIC describes its international business in *C' Magazine* (a Videocipher Division publication), March 1990, p. 11.

[80] *MPAA Comments* at 5-6.

[81] *Adair Comments* at 10-11.

[82] *NRTC Comments* at ii, 19-22. *AHSA Comments* at 8-10. *Adair Comments* at 38-41.

[83] Letter Comments of Russell R. Moore (Apr. 29, 1989). *See* also Letter Comments of Richard Baravalle (Apr. 25, 1989), William R. Howell (June 21, 1989), Bill Nations (Jan. 25, 1989), and Comments of Henry L. Brooks (June 17, 1989).

[84] For example, in Letter Comments of Blake L. Tillotson (Feb. 14, 1990), it is asserted that the standalone VC II decoder "should have cost $200 from the start." Several other individuals sent in letters virtually identical to that of Mr. Tillotson. None provided analysis or evidence to support their price estimate. None addressed the issues of recovery of research and development, marketing, or anti-piracy expenses nor the relationship between patent royalties and product prices. GIC critiques claims that vastly cheaper decoders could be produced, citing what it sees as the relatively small size of the HSD decoder market. *GIC Comments* at 52-55.

[85] *Supra* at paras. 12-13 and *GIC Comments* at 56-59.

[86] *GIC Comments* at 62-74. *SBCA Comments* at 8.

[87] One who does is Robin Adair, who asserts that if the Commission adopted a standard embodying proprietary technology, "a compulsory license to use the technology (not the manufactured board or for that matter an integrated circuit [IC] chip) would have to be a condition of adoption as a standard." *Adair Comments* at 39.

[88] *GIC Comments* at 6-8.

[89] *NEC Reply Comments* at 3-4. *See* also Reply Comments of Payview Limited at 1-3 (filed July 19, 1989).

[90] *GIC Comments* at 25.

[91] *HBO Comments* at 11-12. HBO cites examples of FCC standards proceedings, including Automatic Transmitter Identification, which has been open for more than three years without a standard and ATV, outstanding for almost three years. With respect to ATV, SBCA adds that the FCC Advisory Committee has recently requested a two-year extension of its mandate. *SBCA Comments* at 13. *See* also *NCTA Comments* at 4-5 (standard setting process could create "at least two to four years" of uncertainty.)

[92] *Netlink Comments* at 4. *See also SBCA Comments* at 14 ("Even after the conclusion of a Rule Making proceeding and the establishment of a standard, there could be protracted litigation on the issue causing more consumer confusion.").

[93] *HBO Comments* at 12 and *Netlink Comments* at 4. *See* also *SBCA Comments* at 13-14 and *NCTA Reply Comments* at 2.

[94] *GIC Comments* at 31-32. *See* also Comments of Satellite Viewer's Network at 6 (filed June 15, 1989).

[95] GIC goes on to suggest that [T]hese programmers would lose the opportunity to generate subscription revenue in the period the standards proceeding remains open." *GIC Comments* at 32.

[96] *Netlink Comments* at 4-5.

[97] *NRTC Comments* at 6, 30, *NRTC Reply Comments* at iii.

[98] *NRTC Comments* at 14-29, *NRTC Reply Comments* at 3-5, 16. The licensing dispute is discussed in *NRTC Comments* at 19-22 and *GIC Reply Comments* at 19-21. NRTC complains that it was offered less favorable IRD licensing terms than other licensees. GIC responds that the more favorable terms were available earlier. NRTC does not allege that others currently seeking an IRD license are being offered terms different than those available to NRTC. What appears to be happening is that licensees who were willing to make a commitment to VC II in the earlier, less certain environment, perhaps before its status as

de facto industry standard was assured, received more favorable licensing terms. Such a situation does not require regulatory intervention. Since we conclude this on policy grounds, we do not address the Commission's authority to undertake such intervention.

[99] NRTC, referring to its purchases of standalone decoders over two and one-half years, states that "[N]o price reduction occurred during this period, despite public assurances from GIC of future reductions based upon increased manufacturing volume." *NRTC Comments* at 15. GIC replies that there "has been no price reduction in this production (which was forward priced at introduction to keep the initial price low)," denies that price reductions were promised, and challenges those who assert the contrary to cite a source for the alleged promise of lower prices. *GIC Reply Comments* at 7, note 12 and at 17. NRTC later submitted a letter to Commission staff on this subject. The letter cites no statements from GIC personnel, but it does provide excerpts from 1986 testimony before the House Telecommunications Subcommittee by an executive of M/A Com, the company from which GIC later bought the Videocipher business. That testimony states, in pertinent part that "M/A Com is not in a position to charge monopoly prices for the Videocipher technology. There are several aspects of our contracts that were planned on several years ago, as we have said publicly and in writing. One is we agreed years ago not to raise our pricing on the decoder. Our pricing is downward only. We have agreed to 'not to exceed prices' for the units." Attachment to Letter from John B. Richards to Jonathan D. Levy (Jan. 5, 1990).

[100] *See Report* in Gen. Docket No. 89-88 (in the matter of discrimination in the provision of superstation and network station programming, wherein the Commission announced that it would also adopt a Further Notice of Inquiry on this issue) 5 FCC Rcd. 523 (1990), and *Notice of Inquiry* in MM Docket No. 89-600 (in the matter of competition and the Commission's policies regarding cable television service) 5 FCC Rcd. 362 (1990) at paras. 29, 54-56.

[101] *See Ethyl Gasoline Corp. v. United States,* 309 U.S. 436 (1940); *General Talking Pictures Co. v. Western Electric Co.,* 305 U.S. 124 (1938).

[102] *AHSA Comments* at 17-18.

[103] For a similar assessment, see *SBCA Comments* at 3.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 87-389

In the Matter of

Revision of Part 15 of the Rules regarding the operation of radio frequency devices without an individual license.

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 1990; Released: April 25, 1990

By the Commission:

1. By this action the Commission grants in part the petitions filed on May 26, 1989, by Control Data Canada, Ltd. (CDC) and by the Hewlett-Packard Company Medical Products Group (HP) requesting partial reconsideration and clarification of the *First Report and Order* in this proceeding.[1] The petitioners request reconsideration of that portion of the *First Report and Order* which prohibits new types of operation on frequencies allocated to television (TV) broadcast stations.

2. In the *First Report and Order*, the Commission adopted a comprehensive revision of Part 15 of its rules. Part 15 contains the Commission's rules governing the operation of radio frequency devices without an individual license. The objective of this action was to encourage more effective use of the radio frequency spectrum while providing additional technical and operational flexibility in the design, manufacture and use of non-licensed devices. In taking this action, the Commission recognized the intensive use that future High Definition Television (HDTV) broadcasts may place on the bands allocated to TV broadcast stations. Thus, the Commission prohibited new types of Part 15 devices from access to this spectrum. However, Part 15 devices that were permitted in the TV bands under the former rules were permitted to continue operation.[2]

CONTROL DATA CANADA, LTD. PETITION

3. CDC is a manufacturer of perimeter protection systems operating under Part 15 in the bands 54-72 MHz and 76-88 MHz.[3] In accordance with Section 15.209(g) of the rules, the use of such systems is limited to industrial, business and commercial applications.[4] Further, in accordance with Section 15.201(d) of the rules, the holder of a grant of certification for a perimeter protection system operating in the frequency bands allocated to TV broadcast stations must test each such installation prior to the initiation of normal operation in order to verify compliance with the technical standards.

4. In its petition, CDC requests that the Commission: 1) permit perimeter protection systems operating in the 54-72 MHz and 76-88 MHz bands to be used in residential applications when the residence is an "estate", defined by CDC as residences of two or more acres; 2) provide delegated authority to the staff to exempt particular devices from per-site testing upon a sufficient presentation of data; 3) clarify that all perimeter protection systems may use multiple transmitters that comply with the new emission limits and that the emissions from these transmitters may be measured at a distance of 30 meters, even if that distance is outside of the property boundary; and, 4) clarify the definition of perimeter protection systems to permit the use of any type of radio frequency transmission lines instead of only "leaky cables."

A. Perimeter Protection Systems in "Estate" Residential Areas

5. CDC states that the Part 15 prohibition against the use in residential areas of perimeter protection systems operating in the TV broadcast bands deprives a significant segment of the public of the use of such systems. According to CDC, harmful interference to TV reception from the systems would be minimal due to the low level of emissions permitted under Part 15 for this equipment and the extensive use of cable and satellite television reception systems in "estate" residences. CDC claims that additional protection against harmful interference to television reception could be provided by requiring perimeter protection systems operating on TV channels to use buried transmission cables, causing the emitted signals to travel along the ground or, for the most part, to radiate into the earth. CDC states that existing perimeter protection systems already operate in close proximity to residential areas. Further, it argues that with systems installed in "estate" residences, interference would most likely occur to the owner of the perimeter protection system, who would have a strong incentive to assure that interference to TV reception does not occur. Finally, CDC states that there is no empirical evidence to demonstrate that HDTV, which may take many years to become a reality, will be impacted by operation of perimeter protection systems to any greater degree than the existing TV technology.

6. Comments in response to CDC's petition were filed by the Association of Maximum Service Telecasters (MST). MST states that CDC's request to allow perimeter protection systems operating on the TV frequencies to be used on "estate" residences conflicts with the Commission's earlier rule making that allowed these systems to be operated under Part 15.[5] MST also states that CDC's request relies upon evidence already considered by the Commission and does not present any new evidence to justify a reevaluation of the regulations regarding perimeter protection systems. It points out that CDC's suggestion that the only serious threat of interference would be to television reception on the estate protected by the perimeter protection system ignores the fact that "estate" residences normally abut other residences, apartment buildings and businesses. CDC replies that perimeter protection systems are already being employed on commercial sites that abut residential areas and that the Commission, in the *Order*, concluded that the emission limits applicable to its perimeter protection system were adequate to prevent harmful interference to television reception.

7. We are not convinced that perimeter protection systems operating in the TV bands should be permitted to be employed for residential applications. Limiting these systems to use on "estates" of two or more acres would not

ensure any minimum separation distance between the perimeter protection system and the television antenna receiving system of nearby residences. There is no reasonable method of controlling this separation distance or of providing shielding between a residential perimeter protection system and adjacent residences, regardless of the size of the residential "estate." Interference could be caused to a neighbor whose receiver antenna is in close proximity to the radiating cable of the perimeter protection system, while the owner of the perimeter protection system may not experience interference if the radiating cable was a greater distance from his TV receiving antenna. Thus, there is no basis for concluding that the owner of a two acre or larger "estate" would be more likely to receive interference than a neighbor. We also recognize that many "estate" residences and their neighbors do not employ cable or satellite systems, relying instead on the reception of over-the-air broadcasts. CDC's suggestion to require perimeter protection systems to employ buried transmission cables would not change the interference potential as our emission limits are based on the amount of radio frequency energy radiated from the system into the air. In light of these factors, we are not convinced that perimeter protection systems can be introduced in residential areas without increasing the risk of interference to TV broadcasting. We remain particularly concerned about potential interference to future HDTV receivers. We do not believe that the limited benefits of permitting perimeter protection systems in residential areas warrants the risk of potential interference. Accordingly, CDC's request to permit the operation of perimeter protection systems in "estate" residences is denied.

B. Delegated Authority Regarding Testing of Each Installation Site

8. CDC requests that the Commission delegate authority to the staff to exempt, upon a sufficient presentation of data, particular perimeter protection systems from the requirement that each installation site must be tested to show compliance with the standards. The issue of exempting particular perimeter protection systems from the requirement for the testing of each installation was neither raised in the *Notice of Proposed Rule Making* (*Notice)* nor a "logical outgrowth" of our proposals therein.[6] Thus, under the provisions of the Administrative Procedures Act, changes to this provision can not be implemented through reconsideration of the *First Report and Order*.[7] Notwithstanding this procedural factor, we observe that CDC has provided no justification or other analysis in support of such a change to the regulations. We also note that the field strength levels of emissions from perimeter protection systems are affected significantly by the characteristics of the site, *e.g.*, soil composition, and the method of installation. Thus, we believe that any assurance that the levels of the radiated emissions do not exceed what is permitted under Part 15 can be provided only through the testing of each installation site. Accordingly, CDC's request is denied.

C. Multiple Transmitters

9. CDC requests a clarification of the rules pertaining to use of multiple transmitters with perimeter protection systems. CDC observes that in the *First Report and Order*, the Commission permitted use of multiple transmitters with intentional radiators provided the individual transmitters comply with the rules.[8] It then notes that the Commission denied a request by AT&T to allow multiple intentional radiators in a commercial environment with field strength levels measured 30 meters beyond the property boundary.[9] CDC believes this latter statement could be interpreted to mean that perimeter protection systems using multiple transmitters may not be measured at distances up to 30 meters if the measurements would have to be taken beyond the property line. It indicates that this interpretation could preclude operation of these systems with multiple transmitters. CDC submits that perimeter protection systems often extend to several miles in length and that the use of multiple line amplifiers and similar equipment is necessary to maintain a uniform signal for an entire system. It therefore requests that the Commission provide clarification to assure the continued use of multiple transmitters with perimeter protection systems.

10. The AT&T request would have allowed higher field strength levels within the boundaries of the commercial property than otherwise permitted by the rules. While the Commission did not permit such operation, that decision was not intended to restrict the locations at which field strength measurements may be made of the signals of perimeter protection systems, or the use of multiple transmitters in general. It is, in fact, acceptable to measure the field strength of a perimeter protection system at locations beyond the property boundary.[10] Accordingly, we wish to clarify that perimeter protection systems may employ multiple transmitters provided that each individual transmitter complies with the rules and that the system as installed and tested complies with the emission limits.[11] The emissions of systems may be measured at 30 meters regardless of whether the measurement equipment is located beyond or within the boundary of the property of the system owner.

D. Transmission Lines

11. Finally, CDC objects to the provision in Section 15.3(q) of the rules that restricts the operation of perimeter protection systems to systems employing leaky cables as the radiating source(s).[12] CDC believes that this is an unduly restrictive requirement that will impede the future development of perimeter protection systems. It submits that there is no reason to restrict the kind of transmission line and that any type of transmission line should be permitted provided the emission limits are not exceeded. CDC requests a clarification that the rules requiring perimeter protection systems to employ leaky cables permit the use of any type of radio frequency transmission line.

12. The reference to "leaky cables" in Section 15.3(q) is not intended to limit perimeter protection systems to use of a particular type of transmission line. That is, the term "leaky cable" means any transmission line that emits RF energy.[13] As long as the equipment complies with the technical standards, the type of transmission line employed does not change the interference potential. We recognize, however, that this term may be causing confusion in the industry that could adversely affect the future development of perimeter protection systems, as CDC suggests. We therefore are revising Section 15.3(q) to re-

place the term "leaky cable" with the more generic "RF transmission lines." This change constitutes only a clarification of the rules and does not in any way alter our longstanding policy on the transmission lines that are acceptable for use with perimeter protection systems.

HEWLETT-PACKARD COMPANY MEDICAL PRODUCTS GROUP PETITION

13. HP manufactures transmission systems used to relay biomedical telemetry data. Under the former Part 15 rules, these devices were permitted to operate within the broadcast TV frequency band 174-216 MHz. In the *Order* the Commission allowed these devices to continue to operate on those frequencies as an exception to the general prohibition on the operation of Part 15 devices on TV frequencies.[14] However, biomedical telemetry devices may not operate on any of the other TV frequencies (i.e., 54-72 MHz, 76-88 MHz and 470-806 MHz). These devices may also be operated on almost any other frequency under the general emission limits contained in Section 15.209.[15]

A. Operation in the TV Bands

14. HP requests that the Commission allow operation of biomedical telemetry transmitters on additional frequencies in the TV broadcast bands. HP states that the number of frequencies available on a licensed basis under Part 90 of our rules are not sufficient. In addition, it submits that when the biomedical telemetry devices contain multifunction capabilities, *e.g.,* 2 or 3 electrocardiogram (ECG) waves, blood pressure, temperature and oxygen measurements, the bandwidth requirements in Part 90 are too stringent. Further, HP adds that the existing Part 15 band of 174-216 MHz is severely congested, and the level of man-made noise from other sources is becoming so high as to threaten the continued usefulness of these channels. Thus, HP requests that we permit its new ECG digital monitors to operate within the frequency band 512-566 MHz.[16] It states that because of the low operating power and operation within confined areas, i.e., hospitals, there is no likelihood that these devices would cause interference to existing television reception or to future HDTV reception. HP adds that it is highly unlikely that no vacant TV channels would exist in any given area, regardless of the HDTV allocation scheme ultimately selected. Further, it asserts that any possible interference would be limited to a small area within the hospital with no effect on the area surrounding the hospital. HP does not request any increase in the field strength limits proposed in the *Notice*. No comments or objections were filed in response to HP's petition.

15. Transmitters operating under the general radiated emission limits in 47 CFR Section 15.209 that are used in the confined area of a hospital building should not be a source of interference to television reception, including the reception of HDTV signals. Because of the lack of any controls regarding the location of Part 15 devices, the prohibition against operation in the TV broadcast bands at the general limits was applied to all Part 15 devices. However, biomedical telemetry transmitters are unique devices that are used for such limited applications that operation can easily be confined to specific locations. The additional shielding provided by locating the equipment internal to hospital buildings, combined with the limited application and, subsequently, low proliferation, as compared with other types of Part 15 devices, can be expected to reduce the probability of interference such that the forthcoming HDTV system is not at risk. Accordingly, we will permit biomedical telemetry transmitters to operate at the Section 15.209 emission limits in the frequency bands requested by HP, provided the operation and marketing of these devices is restricted to hospitals.[17]

16. We wish to remind all potential manufacturers of biomedical telemetry transmitters (or any other Part 15 devices) of the provisions contained in Section 15.5 of the rules.[18] Persons operating Part 15 devices are not deemed to have any vested or recognizable right to the continued use of any given frequency. Further, operation is subject to the conditions that any interference that is received must be accepted and any harmful interference that is caused must be corrected. Thus, the future implementation of HDTV, land mobile sharing of the TV broadcast bands, or other authorized use of the spectrum will not be retarded to avoid possible interference to Part 15 devices, even if those devices are used for features such as ECG monitoring.

B. Introduction of New Devices in the TV Bands

17. In view of the prohibition on operation in the TV bands in Section 15.209(a), HP requests clarification as to whether existing devices operating in the 174-216 MHz band could be replaced by a new model possessing some level of enhanced performance or if the prohibition precludes the introduction of these new devices. In response, new models of devices are permitted under the provisions of Section 15.241. As stated in the note under Section 15.209(a), the prohibition against operation in the TV broadcast bands applies only to devices operated under the provisions of that rule section. This prohibition does not apply to devices operated under other rule sections, *e.g.,* Sections 15.231 and 15.241.

ORDERING CLAUSES

18. In accordance with the above discussion and pursuant to the authority contained in Sections 4(i), 301, 302, 303, 304 and 307 of the Communications Act of 1934, as amended, IT IS ORDERED that the Petition for Reconsideration and Clarification filed by Control Data Canada, Ltd. and the Petition for Reconsideration filed by Hewlett-Packard Company Medical Products Group ARE GRANTED to the extent indicated herein and in all other respects ARE DENIED. In addition, IT IS ORDERED that Part 15 of the Commission's Rules and Regulations IS AMENDED as set forth below. These rules and regulations are effective upon publication in the Federal Register.

CHANGES TO THE REGULATIONS

19. Title 47 of the Code of Federal Regulations, Part 15, is amended as follows:

1. The authority citation for Part 15 continues to read as follows.

Authority: Sec. 4, 302, 303, 304, and 307 of the Communications Act of 1934, as amended, 47 U. S. C. Sections 154, 302, 303, 304, and 307.

2. Section 15.3 is amended by revising paragraph (q) to read as follows:

Section 15.3 Definitions.

* * * * *

(q) *Perimeter protection system.* A field disturbance sensor that employs RF transmission lines as the radiating source. These RF transmission lines are installed in such a manner that allows the system to detect movement within the protected area.

* * * * *

3. Section 15.209 is amended by revising paragraph (g) to read as follows:

Section 15.209 Radiated emission limits, general requirements.

* * * * *

(g) Operation in the frequency bands allocated to TV broadcast stations:

(1) Perimeter protection systems operating under the provisions of this Section in the frequency bands allocated to TV broadcast stations, as shown in Part 73 of this Chapter, shall contain their fundamental emissions within the frequency bands 54-72 MHz and 76-88 MHz. Further, the use of such perimeter protection systems is limited to industrial, business and commercial applications.

(2) Biomedical telemetry devices operating under the provisions of this Section in the frequency bands allocated to TV broadcast stations, as shown in Part 73 of this Chapter, shall contain their fundamental emissions within the frequency band 512-566 MHz. Further, the marketing and the use of biomedical telemetry devices operating under this paragraph shall be limited to hospitals.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See First Report and Order*, GEN Docket No. 87-389, 4 FCC Rcd 3493 (1989).

[2] *Id.*, at paras. 50-51. The reference to "the former provisions" is to the Part 15 rules in effect prior to June 23, 1989, i.e., prior to the implementation of the regulations adopted in the *First Report and Order*.

[3] In accordance with Section 15.3(q), a perimeter protection system is "[a] field disturbance sensor that employs leaky cables as the radiating source. These cables are installed in a manner that allows the system to detect movement within the protected area." The frequency bands 54-72 MHz and 76-88 MHz contain TV channels 2-4 and 5-6, respectively. *See* 47 CFR Section 15.3(q). Unless otherwise stated, all of the references herein to Part 15 of the Commission's regulations are to the rules adopted in the *First Report and Order*, i.e., those in effect as of June 23, 1989.

[4] *See* 47 CFR Section 15.209(g).

[5] *See Report and Order*, GEN Docket No. 85-231, 2 FCC Rcd 1569 (1987). The standards for perimeter protection systems operating in the bands 54-72 MHz and 76-88 MHz were implemented in that proceeding.

[6] *See Notice of Proposed Rule Making*, GEN Docket No. 87-389, 2 FCC Rcd 6135 (1987).

[7] *See* 5 USC Section 553(b). *National Black Media Coalition v. FCC*, 791 F. 2d 1016, 1022 (2d Cir. 1986); *AFL-CIO v. Donovan*, 757 F. 2d 330, 338 (D. C. Cir. 1985).

[8] *See First Report and Order*, GEN Docket No. 87-389, *supra*, at para. 137.

[9] *Id.*

[10] The emissions of systems may be measured at 30 meters either beyond or within the boundary of the property of the system owner. However, it is not necessary to make the actual measurements at 30 meters. Measurements may be made at other distances and the results extrapolated for comparison with the limits in the rules. *See* 47 CFR Section 15.31(f).

[11] *See* 47 CFR Sections 15.31(h) and 15.201(d).

[12] *See* 47 CFR Section 15.3(q).

[13] A transmission line is a conductor or series of conductors designed to carry electrical energy from a source to a load.

[14] *See* 47 CFR Section 15.241. Similar operation is permitted in other frequency bands, such as the band 49.82-49.90 MHz under 47 CFR Section 15.235 and the band 88-108 MHz under 47 CFR Section 15.239.

[15] *See* 47 CFR Section 15.209.

[16] This frequency band contains TV channels 21-29.

[17] Operation on the frequency band 174-216 MHz continues to be permitted at a higher field strength, albeit with a limitation of 200 kHz on the bandwidth of the transmission, under 47 CFR Section 15.241.

[18] *See* 47 CFR Section 15.5.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-220

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Hobbs, New Mexico) — RM-7231

NOTICE OF PROPOSED RULE MAKING

Adopted: April 6, 1990; Released: April 25, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Oil Patch Broadcast Partnership (petitioner), requesting the allotment of Channel 243A to Hobbs, New Mexico, as the community's fourth local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Channel 243A can be allotted to Hobbs in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Mexican concurrence in the allotment is required since Hobbs is located within 320 kilometers of the U.S.-Mexican border.

3. We believe the public interest would be served by proposing the allotment of Channel 243A to Hobbs, New Mexico, since an interest has been expressed in providing the community with an additional local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Hobbs, New Mexico	231C1, 239C2, 275C	231C1, 239C2, 243A, 275C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 18, 1990,** and reply comments on or before **July 3, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Matt Edwards
c/o National Cellular
301 Route 17-N, 4th Floor
Rutherford, New Jersey 07070
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 32-42-00 and West Longitude 103-07-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Jersey Central	File Nos. 752349
Power & Light Co.	and 752350
Lakewood, New Jersey	MK-90004

For a waiver of the Rules to allow the use of 3.75 MHz emission bandwidth and non-standard frequencies in the OFS 10 GHz band.

WAIVER

Adopted: April 17, 1990; Released: April 25, 1990

By the Chief, Land Mobile and Microwave Division:

1. Jersey Central Power & Light Company (Jersey) seeks a waiver of Sections 94.15(d) and 94.65(i) of the Commission's Rules, 47 C.F.R. §§ 94.15(d) and 94.65(i), to permit an emission bandwidth of 3.75 MHz on non-standard frequencies in the Private Operational Fixed Microwave 10,550-10.680 MHz (10 GHz) band. Section 94.15(d) requires that applicants choose frequencies listed under Section 94.65. Section 94.65(i) lists the specific frequencies available in the OFS 10 GHz band and also limits emission bandwidth to 2.5 MHz.

2. In support of its request, Jersey states that the proposed 10 GHz spur will connect its Oyster Creek Nuclear Generating Power Plant to a new emergency off-site communications center in Lakewood, New Jersey. Approximately eight T-1 circuits are required (i.e., 192 equivalent voice channels) to serve the new site. According to Jersey, numerous OFS frequency bands have available bandwidths that can accommodate its proposed communications requirements. The 10 GHz band, though, is the most desirable from an operational and spectrum efficiency standpoint. The 1850-1990 MHz and 6525-6875 MHz frequency bands are highly congested in the New Jersey area and are long-haul channels inefficient for the relatively short path proposed. At the same time, Jersey pleads, its proposed spur is longer than practical[1] for 18 GHz frequencies due to its susceptibility to rain attenuation.[2]

3. The Commission may waive any provision of its rules if it determines that good cause has been shown and that a grant of the waiver would not undermine the policies embodied in the rule. *See Thomas Radio v. FCC*, 716 F.2d 921 (D.C. Cir. 1983); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969). We find that unique circumstances in this case justify grant of the waiver. First, Jersey has shown that, of available choices, the proposed 10 GHz system would employ the least amount of spectrum and would operate at near maximum efficiency [3] under current technology. The sensitive nature of nuclear power plant operations also supports the requested higher reliability and use of lower frequencies. Further, with current use of the 10 GHz band in the New Jersey area being sparse[4] and the relatively low effective radiated powers proposed,[5] Jersey's system would have little, if any, effect upon 10 GHz frequency availability.

4. We conclude that under these circumstances the proposed relief would serve the public interest. Pursuant to Sections 0.331 and 1.3, 47 C.F.R. §§ 0.331 and 1.3, Jersey's request for waiver of Sections 94.15(d) and 94.65(i), associated with the referenced applications, IS GRANTED for an indefinite term.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and
Microwave Division

FOOTNOTES

[1] Approximately 2.2 miles.

[2] Approximately three times more susceptible than 10 GHz.

[3] 3.5 bps/Hertz

[4] Jersey's frequency engineering analysis shows only 10 licensees or applicants in the area.

[5] 45.3 and 41.1 dbm.

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 90-54
Gen. Docket No. 80-113

In re

Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Pertaining to Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting:

Private Operational-Fixed Microwave Service,
Multipoint Distribution Service,
Multichannel Multipoint Distribution Service,
Instructional Television Fixed Service, and
Cable Television Relay Service

ORDER

Adopted: April 18, 1990; Released: April 19, 1990

By the Chief, Mass Media Bureau.

Pursuant to a request filed by the United States Catholic Conference on April 13, 1990, and supported by numerous other interested parties, the deadline for filing comments in the above-referenced Rule Making proceeding is extended to May 7, 1990, and the deadline for filing reply comments is extended to June 6, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-2
Phase I

In the Matter of

Filing and Review of
Open Network Architecture Plans

ORDER

Adopted: April 13, 1990; Released: April 25, 1990

1. The *BOC ONA Order* [1] announced the establishment of a Federal/State Joint Conference, pursuant to Section 410(b) of the Communications Act,[2] as an ongoing forum for state/federal cooperation to facilitate the development and implementation of Open Network Architecture (ONA). On May 4, 1989, the Commission appointed two federal Commissioners and thirteen state Commissioners to the Joint Conference. [3] On November 7, 1989, this Commission appointed a third federal Commissioner to the Joint Conference.[4]

2. In forming the Joint Conference, the Commission also established a sunset date of June 30, 1990, at which time an assessment could be made on the future course of the Joint Conference. During the March 1, 1990 meeting of the Federal/State Joint Conference, the members determined that the Joint Conference has made progress on several issues related to ONA and that the dialogue the conference has opened between federal and state regulators has been beneficial. They agreed, however, that additional work needs to be done with respect to implementing ONA. The Joint Conference members believe that this work can best be accomplished through a continuation of the dialogue and cooperation made possible by the Joint Conference. Thus, the members reached a consensus and recommended that this Commission extend the Joint Conference until June 30, 1992.[5] We agree with the Joint Conference consensus that the dialogue and cooperation made possible by that body can facilitate progress in implementing a workable and effective ONA structure and, accordingly, conclude that the sunset date should be extended two years.

3. Accordingly, IT IS ORDERED, that the sunset date for the Federal/State Joint Conference convened in this proceeding IS HEREBY EXTENDED until June 30, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 1, 110, paras. 214-223 (1989) (*BOC ONA Order), pets. for recon. pending; app. for review pending sub nom., Pacific Bell* and *Nevada Bell v. FCC,* No. 89-1194 (D.C. Cir.).

[2] 47 U.S.C. § 410(b).

[3] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 4017 (1989) *(May 4 Joint Conference Order).* The Commission increased state membership on the Joint Conference from the originally proposed seven to thirteen members at the request of the National Association of Regulatory Utility Commissioners (NARUC).

[4] Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 4 FCC Rcd 8217 (1989). The appointment of a third FCC Commissioner to the Joint Conference was consistent with our desire to expand cooperation between state and federal ONA policymakers, as well as the decision in the *May 4 Joint Conference Order* to increase the number of state Joint Conference members. *Id.*

[5] Federal/State Joint Conference on Open Network Architecture, Consensus Statement on Continuation of the Joint Conference, signed by Alfred C. Sikes, Chairman, FCC, Federal/State Joint Conference, and Thomas Beard, Florida PSC, Chair, State Joint Conference Commissioners.

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 90-216

In the Matter of

Amending Sections 21.701 and 94.65 of the Commission's Rules to Rechannelize the 10550-10680 MHz Band. RM-6180

NOTICE OF PROPOSED RULE MAKING

Adopted: April 9, 1990; Released: April 25, 1990

By the Commission:

I. INTRODUCTION

1. The Harris Corporation - Farinon Division (Harris), a manufacturer of microwave and multiplex systems, has filed a Petition for Rule Making seeking to amend Sections 21.701(d) (Domestic Public Fixed Radio Services) and 94.65(i) (Private Operational-Fixed Microwave Service) of the Commission's Rules, 47 C.F.R. §§ 21.701(d), 94.65(i) to authorize a new channeling plan to provide for four 3.75 MHz channel pairs in the 10550-10680 MHz band.[1] We have reviewed Harris' proposal and the comments filed in this proceeding and tentatively conclude that allowing licensees in the 10550 - 10680 MHz band to combine or "stack" adjacent channels, as proposed by Harris, will serve the public interest by promoting more efficient use of the spectrum.

II. BACKGROUND AND PETITION

2. The 10550-10680 MHz frequency band is shared, on a co-primary basis, among domestic radio common carriers licensed under Part 21 of our rules and private carriers licensed under Part 94 of our rules for use in providing point-to-point microwave radio communications. Prior to 1984, these frequencies were allocated for point-to-point microwave internodal links for nodal stations (Digital Termination Stations) in the Digital Electronic Message Service (DEMS). In 1984, the use of the band was expanded to include all point-to-point microwave message communications. The current channeling plan has two groups of four channel pairs: (1) the 2.5 MHz authorized bandwidth channels, with 65 MHz separation and (2) the 1.25 MHz authorized bandwidth channels, also with 65 MHz separation.

3. The Harris petition proposes to add four 3.75 MHz bandwidth channel pairs that would overlay the existing 1.25 MHz and 2.5 MHz bandwidth channel pairs, thereby increasing the frequency bandwidth in a manner that will permit more efficient use of the spectrum and enhance user options in meeting operational fixed microwave needs. Harris asserts that 3.75 MHz bandwidth channel pairs could provide the equivalent of approximately 8 T-1 circuits, or approximately 192 voice channels. None of the existing channel pairs now provided by Sections 21.701(d) and 94.65(i) would be deleted from the rules. In addition, existing frequency coordination procedures, according to Harris, will assure compatibility of operations between the existing 1.25 MHz and 2.5 MHz channel operators and the proposed 3.75 MHz channel users in the band. Harris observes that the concept of overlaying channels of bandwidths has been applied very successfully in other bands by this Commission, *e.g.*, in the 952-960 MHz, 1850-1990 MHz, 6525-6875 MHz, and 17.7-19.7 GHz bands.

4. Harris notes that 3.75 MHz bandwidth channel pairs are within the 5 MHz bandwidth maximum authorized in the 10550-10680 MHz band allocations. Harris also claims that a bandwidth of 3.75 MHz is most consistent with current common carrier allocations at 2110-2180 MHz where the maximum bandwidth is 3.5 MHz. Commonality of modulation techniques and transmission bit rates between the 2 GHz and 10.5 GHz bands would, Harris asserts, enhance user options and encourage spectrally efficient system designs. (Standard digital line rates of 63 Kb/s and multiples of that rate are already offered in 3.5 MHz bandwidths at 2 GHz). Furthermore, Harris maintains that adoption of its proposal will not require additional revisions to the Commission's rules and requirements relative to the use of these frequencies under Parts 21 and 94.

III. COMMENTS

5. Comments were filed by PacTel Cellular (PacTel), Metro Mobile CTS, Inc. ("Metro Mobile"), and Utilities Telecommunications Council (UTC) in response to the Harris petition. All commenters generally support the Harris proposal. No opposition to the proposal was filed.

6. Metro Mobile, a cellular radio holding company, offers nonwireline cellular service through its subsidiaries in twelve markets throughout the United States on a common carrier basis. Metro Mobile, whose cellular systems use point-to-point microwave links to interconnect the mobile telephone switching office (MTSO) and cell sites, believes the Harris proposal promotes more efficient use of the spectrum. Metro Mobile observes that the 10550-10680 MHz band is underutilized in its metropolitan statistical operating areas, as contrasted with lower frequency allocations with similar bandwidths (*e.g.*, the common carrier 2 GHz band). It states that the 10.5 GHz band is less vulnerable to precipitation attenuation than either the 18 GHz or 23 GHz bands, and therefore, is a more desirable alternative for high capacity applications. Metro claims that other common carrier bands, such as the 4 GHz, 6 GHz and 11 GHz bands, employ bandwidths that are not suitable for final distribution to individual cell locations. The use of several frequency paths in random would enhance the quality of cellular service and provide for the more efficient use of microwave spectrum. PacTel, a cellular radio license, concurs with Harris' proposal and expresses the need to use the 3.75 MHz channel pair to meet its circuit requirements.

7. UTC, a national representative on telecommunications matters for the nation's electric, gas, water and steam utilities, also concurs with Harris' proposal and its underlying rationale. However, it expresses concern regarding the adequacy of existing frequency coordination procedures to provide the necessary protection to existing

users in the band. Although it does not offer specifics, UTC urges the Commission to consider carefully the adequacy of the existing frequency coordination procedures to ensure the compatibility of existing licensees using 1.25 MHz and 2.5 MHz channel pairs and users of the proposed 3.75 MHz frequencies.

IV. DISCUSSION

8. The petition and supporting comments present a flexible channel plan that should increase the utilization of the 10550-10680 MHz band by overlaying existing channel pairs, and thereby increase the spectrum efficiency of the band. We support this proposal and believe it has the potential to maximize spectrum efficiency both in terms of the number of potential users as well as the types of transmissions. In addition, the proposal would effectively alleviate the current congestion in the 2 GHz band by cellular radio licensees who use those frequencies to interconnect cells to the MTSO's. We agree with Harris and other commenters that the 10550-10680 MHz frequencies are currently underutilized due, in part, to the smaller bandwidth allocations, the slow development of Digital Termination Systems, and the need for interconnection of nodal stations.

9. We also agree with Metro's claim that the 10.6 GHz band is less subject to precipitation attenuation than the 18 GHz and 23 GHz bands. The common carrier 4 GHz, 6 GHz and 11 GHz bands employ wider bandwidths, such as 20 MHz, 30 MHz or 40 MHz, and therefore, are not desirable frequencies for low capacity microwave needs.

10. We also tentatively conclude that the existing microwave frequency coordination procedures set forth in Sections 21.100(d) and 94.63(a) of the rules will provide adequate protection to the existing 10550-10680 MHz band users. In other bands where a similar approach has been used, current coordinating procedures have been adequate, and UTC has presented no basis for believing current procedures will not continue to be adequate. All applicants would coordinate the usage of 3.75 MHz bandwidth channels with any existing users of the 1.25 MHz and 2.5 MHz bandwidths consistent with the coordination procedures described in rule Sections 21.100(d) and 94.63(a). However, we invite interested parties to specifically identify any changes they believe may be necessary.

V. INITIAL REGULATORY FLEXIBILITY ANALYSIS

A. Reason for Action.

11. The Commission is proposing these rule changes to implement a new channeling plan in the 10550-10680 MHz band. The channeling plan for the 10550-10680 MHz band does not currently permit the use of 3.75 MHz bandwidth channel pairs. The purpose of these rule changes is to increase the efficient utilization of the spectrum.

B. Legal Basis.

12. Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i), 303(g), 303(r), and 332(a).

C. Reporting, recordkeeping and other compliance requirements.

13. No new requirements will be imposed upon licensees because of this action.

D. Federal rules which overlap, duplicate or conflict with this rule.

14. None.

E. Description, potential impact, and number of small entities involved.

15. Many small entities and cellular telephone companies could be positively affected by these proposals stemming from the more efficient utilization of the spectrum. Point-to-point microwave radio systems would be utilized more economically with increased channel capacity and decreased likelihood of harmful interference in a given area. The proposal will require careful frequency coordination. Comments are sought on the sufficiency of frequency coordination procedures currently applicable to common carrier and private microwave users for the proposed channel pairs.

F. Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives.

16. None.

VI. PAPERWORK REDUCTION ACT STATEMENT

17. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record/keeping, labeling, disclosure or record retention requirements, and will not increase burden hours imposed upon the public.

VII. ADMINISTRATIVE MATTERS

18. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda-period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

19. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate

cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

20. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation, Section 1.1206.

21. Pursuant to applicable procedures set forth in Sections 1.415 and 1.1419 of the Commission's Rules, interested parties may file comments on or before **May 25, 1990,** and reply comments on or before **June 11, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

22. Authority for issuance of this Notice of Proposed Rule Making is contained in Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i), 303(g), 303(r) and 332(a).

23. The Secretary shall cause a copy of this Notice of Proposed Rule Making, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, 5 U.S.C. § 603(a).

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

APPENDIX

Parts 21 and 94 of the Commission's Rules and Regulations (Chapter 1 of Title 47 of the Code of Federal Regulations) is proposed to be amended as follows:

Part 21 - Domestic Public Fixed Radio Services

1. The authority citation for Part 21 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. Section 21.701(d) is amended by adding a new paragraph 3 to read as follows:

* * * * *

(d) * * *

(3) 3.75 MHz authorized bandwidth channels, 65 MHz separations:

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10551.875	10616.875
10555.625	10620.525
10559.375	10624.375
10563.125	10628.125

* * * * *

Part 94 - Private Operational Fixed Microwave Service

1. The authority citation for Part 94 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. Section 94.65(i) is amended by adding a new paragraph (3) to read as follows:

* * * * *

(i) * * *

(3) 3.75 MHz authorized bandwidth channels, 65 MHz separation

Transmit (receive) (MHz)	Receive (transmit) (MHz)
10551.875	10616.875
10555.625	10620.525
10559.375	10624.375
10563.125	10628.125

* * * * *

FOOTNOTE

[1] The specific band segments under consideration are 10550-10565 MHz and 10615-10630 MHz.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 16, 1990

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON PACIFIC'S REQUEST FOR EXTENSION OF SMART TALK MARKET TRIAL AND WAIVER OF 90 DAY NOTICE PERIOD (CC DOCKET 88-616)

On April 6, 1990, Pacific Bell Directory (Pacific) filed a request for a one year extension of its SMART Talk market trial in the Sacramento area, which is currently scheduled to end in January 1991. Pacific states that it has encountered unexpected problems during the trial, adding that sales of the service were lower than anticipated. Pacific also states that a voice storage system would meet the needs of the SMART Talk service more efficiently and more economically than the current gateway design. Pacific explains that an additional period of one year is needed for the revised trial because SMART Talk is offered in conjunction with Pacific's printed yellow pages and the service is tied to the life cycle of the printed directories. As a result, Pacific requests authority to extend its trial of SMART Talk for an additional year, until January 1992, to allow the company to draw meaningful conclusions about the commercial potential of SMART Talk.

Pacific also requests a waiver of the requirement that 90 days notice be given before commencement of the revised market trial. Pacific states that such a waiver is necessary to allow Pacific's sales campaign for SMART Talk to coincide with the sale of advertisements in the printed directories. Pacific believes that 50-60 days notice is sufficient because Pacific enhanced service providers are already aware of the existing market trial that Pacific seeks to extend. Pacific states that it intends to start marketing the service in June, and adds that it will halt this activity if the Commission denies its request.

Interested parties should file comments on this request by **May 1, 1990,** and reply comments by **May 10, 1990,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of Pacific's request can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-599

In the Matter of

Amendment of Parts 0, 1, 2, and 95 of the Commission's Rules regarding the establishment of a Personal Emergency Locator Transmitter Service. RM-6681

ORDER

Adopted: April 17, 1990; Released: April 18, 1990

By the Deputy Chief, Private Radio Bureau:

1. The Personal Radio Steering Group, Inc. has requested that the Private Radio Bureau extend the time for filing reply comments fifteen days.

2. The Personal Radio Steering Group, Inc. indicates that the purpose of the extension is to consider the numerous comments filed in this proceeding which differed significantly from or went significantly beyond the issues contained in the Notice of Proposed Rule Making. The additional time will allow the petitioner to prepare more meaningful reply comments.

3. We find that the public interest will be served by granting the brief extension of time requested in order to permit full and thorough preparation of comments of interested parties. In view of the above and pursuant to the authority contained in Section 0.331 of the Commission's Rules, the Personal Radio Steering Group, Inc.'s request for extension of time IS GRANTED. The date for filing reply comments in this proceeding is extended to May 4, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Beverly G. Baker
Deputy Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released; April 17, 1990

COMMENTS INVITED ON MICHIGAN REGIONAL PUBLIC SAFETY PLAN

The Commission has received the public safety radio communications plan for the Michigan Area (Region 21).

In accordance with the Commission's Report and Order in General Docket No. 87-112 implementing the Public Safety National Plan, parties are hereby given thirty days from the date of Federal Register publication of this public notice to file comments and fifteen days to reply to any comments filed. (*See* Report and Order, General Docket No. 87-112, 3 FCC Rcd 905 (1987), at paragraph 54.)

In accordance with the Commission's Memorandum Opinion and Order in General Docket No. 87-112, Region 21 consists of the State of Michigan (except Ottawa, Kent, Van Buren, Kalamazoo, Barry, Muskegon, Allegan, Berrien, Cass and St. Joseph Counties). General Docket No. 87-112, 3 FCC Rcd 2113 (1988).)

Comments should be clearly identified as submissions to *General Docket 90-221, Michigan Area - Region 21,* and commenters should send an original and five copies to the Secretary, Federal Communications Commission, Washington, DC 20554.

Questions regarding this public notice may be directed to Maureen Cesaitis, Private Radio Bureau, (202) 632-6497 or Fred Thomas, Office of Engineering and Technology, (202) 653-8112.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-182

In the Matter of

Automated Reporting Requirements
for Certain Class A and Tier 1
Telephone Companies (Parts 31,
43, 67, and 69 of the FCC's Rules)

ORDER INVITING COMMENT

Adopted: April 16, 1990; Released: April 18, 1990

By the Chief, Common Carrier Bureau:

INTRODUCTION

1. By this Order, we invite comment on certain proposed revisions to FCC Report 43-01, the ARMIS Quarterly Report (Quarterly Report). The Quarterly Report contains financial and operating data which the Common Carrier Bureau (Bureau) employs to monitor the local exchange carrier industry and perform routine analyses of costs and revenues on behalf of the Commission.[1] The proposed revisions are designed to improve the format and content of the Quarterly Report and thus enhance the effectiveness of our monitoring activities. We propose to: (1) revise Table I, Cost and Revenue Table, from its current format, which contemplates quarterly data, to a cumulative, year-to-date format; (2) add a new Table III, Restated Data Table; and (3) revise the Quarterly Report to reflect minor technical changes to Tables I and II. After reviewing comments by interested parties, we will issue an order adopting revisions to the Quarterly Report as proposed herein or modified as appropriate to reflect suggestions or concerns presented by commenters. We intend to implement revisions to the Quarterly Report to be incorporated in the carriers' next submissions scheduled to be filed on July 2, 1990.[2]

BACKGROUND

2. In the *ARMIS Order*, [3] the Commission established an automated system for collecting from certain local exchange carriers the financial and operating data necessary to administer various provisions of the Commission's Rules. The Commission's ARMIS system consists of six reports to be submitted by subject carriers, including FCC Report 43-01, which is filed on a quarterly basis. The Commission broadly outlined in Appendix A to the *ARMIS Order* the quarterly data it sought from carriers, and delegated authority to the Bureau to develop the record layout, format, media, etc. of an automated report collecting the data listed in Appendix A.[4] Pursuant to this delegation of authority, the Bureau released the *First Quarterly Report Order* on May 31, 1988, in which we prescribed the original format and instructions for FCC Report 43-01.[5] On January 6, 1989, we made further revisions to FCC Report 43-01 in the *Second Quarterly Report Order* [6] to carry out the Commission's instructions in the *ARMIS Reconsideration Order*; we also made certain other technical revisions to the report on our own motion. We subsequently released an *Erratum* on August 29, 1989, making a number of additional technical changes to the Quarterly Report.[7] As this history indicates, the Quarterly Report has evolved as the Commission, the Bureau and the carriers have identified areas that need modification or improvement.

PROPOSED REVISIONS TO FCC REPORT 43 - 01

3. The revisions proposed herein are designed to improve the Quarterly Report in light of our experience in administering the Commission's ARMIS regime since 1988. The current format of Report 43-01 calls only for data pertaining to the relevant quarter; it does not capture adjustments made by the carriers to data submitted in prior quarters. As a result, we have experienced difficulty in identifying these out-of-period adjustments and assessing their impact on the quarterly data as currently presented. We believe that analysis of carrier-initiated adjustments to previously-reported financial data is crucial to the success of the Commission's ARMIS program in monitoring effectively the carriers' revenue requirements, rates of return, jurisdictional separations and access charges. We therefore propose two revisions to the Quarterly Report which are designed to facilitate identification and analysis of out-of-period adjustments. First, we propose to revise Table I to reflect cumulative, year-to-date data, rather than quarterly data, for all columns and rows. Second, we propose to add a new Table III, Restated Data Table. This table will display data for the current quarter and cumulative data for the current and previous enforcement periods. The data in this table are highly aggregated in order to minimize the burden on the reporting carriers. Table III, combined with the changes in Table I, will enhance our ability to analyze the impact of prior-period adjustments on previously-filed reports.

4. We also propose various minor technical changes to Tables I and II in response to a recent Commission decision and various suggestions from the carriers. In the *Rate Base Component Proceeding*,[8] the Commission on reconsideration amended its rules to eliminate the deduction of other accrued liabilities from the rate base of telephone carriers. We therefore propose to eliminate row 1860, "Other Accrued Liabilities," from the Quarterly Report in order to accommodate this change in Section 65.830(a) of the Commission's Rules.[9] Finally, we are revising the Quarterly Report to reflect certain technical changes suggested by the carriers which should ease their filing burden as well as improve the quality of the data provided to the Commission. The majority of these revisions simply require changes in the placement of "N/A" at various positions in Table I.

5. The proposed revisions to the Quarterly Report are described in detail in Appendix I to this Order. Appendix II presents the proposed format and accompanying instructions for the revised Quarterly Report in its entirety. The revised pages of the Quarterly Report are indicated as such by "Rev." in the upper right hand corner of those pages. Copies of the two appendices to this Order may be obtained from the Commission's con-

tractor for public records duplication, International Transcription Services, Inc., Suite 140, 2100 M Street, N.W., Washington, D.C., 20037, telephone number (202) 857-3800. The appendices also are available for public inspection and copying at the public reference room of the Commission's Accounting and Audits Division, 2000 L Street, N.W., Room 812, Washington, D.C.

PLEADING CYCLE

6. Interested parties may submit comments on the proposed revisions to FCC Report 43-01 by **May 4, 1990**. Replies must be submitted by **May 11, 1990.**

PAPERWORK REDUCTION ACT

7. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

ORDERING CLAUSE

8. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. Section 154(i), and Section 0.291(b)(4) of the Commission's Rules, 47 C.F.R. Section 0.291(b)(4) (1989), that comment IS INVITED regarding the proposed revisions to FCC Report 43-01 as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] More specifically, the Quarterly Report collects highly aggregated financial data reflecting the results of accounting and cost allocation requirements prescribed in Parts 32, 36, 64 and 69 of the Commission's Rules. *See generally* 47 C.F.R. § 43.22 (1989).

[2] *See* 47 C.F.R. §§ 1.5(j), 43.22 (1989).

[3] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), 2 FCC Rcd 5770 (1987) (*ARMIS Order), recon.*, 3 FCC Rcd 6375 (1988) (*ARMIS Reconsideration Order), further recon.*, 4 FCC Rcd 8240 (1989).

[4] *See ARMIS Order*, 2 FCC Rcd at 5777. *See also* 47 C.F.R. § 0.291(b)(4) (1989) (delegating authority to the Bureau to "approve or prescribe the specific data to be entered on and the computer format and media for [ARMIS reports]").

[5] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), 3 FCC Rcd 3874 (Com.Car.Bur. 1988) (*First Quarterly Report Order).*

[6] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), 4 FCC Rcd 973 (Com.Car.Bur. 1989) (*Second Quarterly Report Order).*

[7] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), 4 FCC Rcd 7219 (Com.Car.Bur. 1989).

[8] Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, 3 FCC Rcd 269 (1987), *recon.*, 4 FCC Rcd 1697 (1989) (collectively, the *Rate Base Component Proceeding), appeal pending sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1175 (D.C. Cir.) (pet. for rev. filed March 1, 1988).

[9] 47 C.F.R. § 65.830(a) (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 19, 1990

PROCEDURES FOR FILING ERRATA TO SUPPORT INFORMATION FOR ANNUAL 1990 ACCESS TARIFFS

In an Order, *Commission Requirements for Cost Support Material To Be Filed with 1990 Annual Access Tariffs*, DA 90-274, released February 26, 1990, (*1990 TRP Order*), the Common Carrier Bureau addressed procedures for the filing of errata by local exchange carriers (LECs) to correct inaccurate cost support data accompanying the 1990 annual access tariff filings made on April 2, 1990. The Bureau noted that the filing of flawed supporting information and the subsequent submission of errata seriously detracted from the ability of the Commission and interested parties to evaluate the reasonableness of proposed rates within the notice period. The Order therefore adopted procedures, similar to those employed in the review of past access tariff filings, to address this problem, including the requirement that carriers request special permission to submit corrected data while maintaining the scheduled effective date of the annual filing.

Any errata relating to the 1990 annual access tariff filing should be filed under an application for special permission requesting that the April 2, 1990 transmittal take effect on the originally scheduled effective date of July 1, 1990. This includes errata filed to correct errors or otherwise revise tariff support material. We emphasize that carriers filing annual access tariffs are under a legal obligation to correct any erroneous data discovered in the Tariff Review Plan (TRP), Automated Reporting and Management Information System (ARMIS) data referenced by the TRP, or other cost support material in a timely fashion. Carriers should also recognize that any delay in correcting erroneous data increases the possibility that their filing will be treated as a new transmittal with an effective date later than July 1.

The following guidelines detail the procedures that carriers should follow when submitting errata.

TYPES OF ERRATA REQUIRING SPECIAL PERMISSION

Carriers must seek special permission to correct all clerical, transcription, substantive, minor, or other errors, and to supply any data omitted in the April 2, 1990, filing. This requirement applies to both the TRP charts and to the historical ARMIS reports (ARMIS reports 43-03 and 43-04) included by reference in the TRP, and is essential to the Commisssion's review of the annual access tariffs since even a minor error or omission may impede the Commission's performance of its duties under Section 201, Section 202, and other provisions of the Communications Act. It is also important that corrections be placed in the public record so that interested members of the public will have an opportunity to review, analyze, and comment on the revised data. We will not attempt to delineate classes of errata in advance, but we anticipate that special permission will, as in the past, be granted routinely for minor corrections that are filed promptly and represent good faith efforts to correct inadvertent errors.

FORM OF FILING

The application for special permission to make an errata filing should be accompanied by either the corrected pages, properly numbered and clearly labeled to indicate the date of the re-submission and the location in the filing, or by a replacement filing including both uncorrected and corrected pages. If special permission is granted, the Commission will issue a special permission number for the errata filing and a letter granting the request will be prepared and sent to the carrier.

If the corrections include changes to information on computer disks, then replacement disks should be submitted with the errata filing, labeled to show clearly the date of the re-submission and other identifying information. Both filings for special permission and subsequent errata submissions should be filed in the same manner as the corresponding material in the April 2, 1990, filing. The application for special permission should state that it concerns a proposed amendment to the carrier's annual access filing, identifying the transmittal number and other pertinent information.

If the application for special permission is granted, and the revisions do not affect rates, the carrier should file an amended transmittal using the transmittal number of the April 2, 1990, filing. If revisions include any change in a rate, a new transmittal number should be assigned and used. If the application for special permission is denied, a new transmittal number should be used and the material should be filed as required in the *1990 TRP Order*.

FILING DATES

Carriers are directed to file applications for special permission to file errata correcting errors and omissions in their annual access tariffs and support materials as these errors and omissions are discoverd. However, in order to make this process more manageable, we require that applications for special permission to file errata be filed only on Wednesday, April 25, 1990. Such applications should include all errata to the April 2, 1990, filing which the LECs have filed thus far, including ARMIS reports 43-03 and 43-04, as well as errata which have not been filed. This schedule should allow interested parties a reasonable opportunity to track all relevant errata to the 1990 annual access tariff filing. We emphasize that Wednesday, April 25, 1990, is the cutoff date for filing applications for special permission to make errata filings. After this date, carriers must make a substantial showing of good cause in order for a filing even to be considered. The date on which errata filings shall be made will be specified in the letters granting the carriers' special permisssion requests.

Although carriers remain obligated to correct filed data when they identify errors, they should not expect that special permission will be granted with respect to filings at a later date absent a substantial showing of good cause. Distribution of copies of applications for special permis-

sions should be made in the same manner as the April 2, 1990, filing. Carriers are reminded to serve copies on the Commission's commercial copier, International Transcription Service.

PETITIONS AND COMMENTS

Interested parties may file any comments with respect to errata filings not later than Wednesday, May 2, 1990. We do not anticipate permitting an opportunity for further comment after this date.

For further information, contact Chris Frentrup at 632-6312 or Judy Nitsche at 632-5550.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Illinois Consolidated Telephone Company

Petition for Waiver of Part 69 Regarding Abbreviated Dialing Arrangement

ORDER

Adopted: April 20, 1990; Released: April 20, 1990

By the Chief, Common Carrier Bureau:

1. On January 12, 1990, Illinois Consolidated Telephone Company (ICTC) filed Transmittal No. 44 which revises its Tariff F.C.C. No. 2 to expand its Feature Group offerings to include Feature Group B (FGB) and to introduce an Abbreviated Dialing Arrangement (ADA) as an option available to customers of standard FGB access service. This latter option will allow ICTC to offer an alternative to carriers in areas where equal access is not yet available. No petitions were filed against the transmittal. Transmittal No. 44 is scheduled to become effective on April 21, 1990.

2. In order to implement Transmittal No. 44, ICTC filed a petition requesting a waiver of Section 69.113 of the Rules, 47 C.F.R. § 69.113.[1] A Public Notice establishing a pleading cycle for the waiver petition was released on February 20, 1990.[2] The United States Telephone Company (USTA) filed comments in support of ICTC's waiver request.

3. ICTC seeks a waiver in order to charge other than non-premium access rates for ADA at its digital end offices which are not yet converted to equal access. Section 69.113 governs the computation of non-premium access charges for MTS-WATS equivalent services. Rather than charging the rate for non-premium access -- which is 55 percent of the premium access rate -- ICTC seeks to charge 95 percent of the premium rate for FGB ADA service. According to ICTC, the Bureau determined that the 95 percent rate level represents the best estimate of the correct market price for ADA service resulting in a *de minimis* effect on National Exchange Carrier Association (NECA) pool revenues. ICTC Waiver at 2, citing NECA, Revisions to Tariff F.C.C. No. 5, 3 FCC Rcd 5791, 5792 (1988) (*NECA Order*).

4. In its comments, USTA maintains that ICTC's waiver request should be granted because it is consistent with the *NECA Order* and the *ADA Order*.[3] USTA states it has consistently supported efforts to permit local exchange carriers to offer ADA because of the benefits it can provide to customers. USTA Comments at 2.

5. The Commission has determined that ADA appears to represent an improvement over existing non-premium access, and has encouraged its deployment as an optional access service in areas where equal access is not yet available.[4] In view of the Commission's previous pronouncements on ADA and ICTC's showing, the Bureau believes that good cause exists to waive Section 69.113 and that strict compliance with the rule in this instance would be inconsistent with the public interest.[5]

6. Accordingly, IT IS ORDERED that the petition for waiver filed by Illinois Consolidated Telephone Company IS GRANTED, to the extent provided herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] On April 4, 1990, ICTC filed Application No. 19 seeking a waiver of Section 61.38 of the Rules, 47 C.F.R. § 61.38, to omit demand data for ADA. The Tariff Division granted the application on April 6, 1990, subject to the condition that the waiver was granted for a temporary one-year period and that ICTC should submit Section 61.38 data no later than 90 days prior to the end of the one-year period.

[2] Illinois Consolidated Telephone Company Filed Petition for Waiver of Part 69 To Establish Optional Abbreviated Dialing Arrangement, 4 FCC Rcd 1094 (1990).

[3] Abbreviated Dialing Arrangement and the Application of Premium Access Charges in Docket 78-72, Phase III, Memorandum Opinion and Order, 2 FCC Rcd 6758 (1987) (*ADA Order*).

[4] *ADA Order*, 2 FCC Rcd at 6761

[5] Rules may be waived if there is "good cause" to do so. *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. WAIT Radio v. FCC, 418 F. 2d, 1153, 1159 (D.C. Cir. 1969).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-156

In re Applications of

AUGUSTA RADIO FELLOWSHIP INSTITUTE, INC. d/b/a CAROLINA RADIO FELLOWSHIP (hereafter "Fellowship") File No. BPED-880301MD

RADIO FOUR BROADCASTING, INC. (hereafter "Radio Four") File No. BPH-880301MW

For Construction Permit
for a New FM Station
in St. Matthews, South Carolina
Channel 230A (93.9 MHz)

HEARING DESIGNATION ORDER

Adopted: March 8, 1990; Released: April 26, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Unresolved Issues Fellowship*. As part of the "program of random checks of the financial qualifications of applicants for construction permits" announced in the Commission's March 19, 1987 *Public Notice* (Mimeo No. 2418), the Bureau required that all applicants in the 1988 Murrells Inlet, South Carolina proceeding furnish documentary proof of their respective financial certifications. (MM Docket No. 88-296) Fellowship, an applicant in the Murrells Inlet proceeding, (BPED-870730MV) submitted deficient documentation as to its financial ability to construct and operate the facilities for the 11 construction permit applications pending at the time of the filing of its Murrells Inlet application. Accordingly, the following issues were added against Fellowship in the Hearing Designation Order:

> 3. To determine with respect to . . . Fellowship whether, in light of the evidence adduced concerning the deficiencies set forth in this Order, the applicant [is] financially qualified.
>
> 4. To determine (a) whether, in light of the evidence adduced pursuant to issue 3, above, Fellowship made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission or attempted to deceive or mislead the Commission and (b) if issue (a), above, is resolved in the affirmative, the effect thereof on Fellowship's basic qualifications to be a Commission licensee.

3. Pursuant to Fellowship's November 10, 1988 request, in a *Memorandum Opinion and Order* released February 1, 1989, the presiding Administrative Law Judge dismissed Fellowship's application with prejudice; the above issues were never tried. These unresolved issues call into question Fellowship's qualifications to be a Commission licensee. Therefore, such issues will be specified and tried against Fellowship in this proceeding.

4. Fellowship petitioned for leave to amend its application on June 28 and September 9, 1988; January 18 and April 10, 1989; and January 31, 1990. The accompanying amendments were filed after June 6, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

> 1. To determine with respect to Fellowship whether, in light of the evidence adduced concerning the deficiencies set forth in the Murrells Inlet, South Carolina Order, the applicant is financially qualified.
>
> 2. To determine (a) whether, in light of the evidence adduced pursuant to issue 1, above, Fellowship made misrepresentations to the Commission, was lacking in candor in its dealings with the Commission or attempted to deceive or mislead the Commission and (b) if issue (a), above, is resolved in the affirmative, the effect thereof on Fellowship's basic qualifications to be a Commission licensee.
>
> 3. To determine which of the proposals would, on a comparative basis, better serve the public interest.
>
> 4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Fellowship ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the

Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

ARKANSAS	File Nos. BRET-870130KL
EDUCATIONAL	BRET-870130KN
TELEVISION	BRET-870130K0
COMMISSION	BRET-870130KP
	BRET-870130KQ

For Renewal of License of

Stations KETS(TV), *et al*,
Little Rock, Arkansas

MEMORANDUM OPINION AND ORDER

Adopted: April 5, 1990; Released: April 26, 1990

By the Commission:

1. The Commission has before it three petitions for reconsideration[1] of our *Memorandum Opinion and Order* ("Order"), 3 FCC Rcd 1923 (1988), wherein we granted renewal of license, subject to EEO reporting conditions, to non-commercial educational Station KETS(TV), Little Rock, Arkansas, licensed to the Arkansas Educational Television Commission.[2] In our *Order*, the Commission found that, while AETC had made some efforts to recruit and employ blacks and other minorities, no steps had been taken to determine whether the recruitment sources being utilized were referring minority applicants. Consequently, the Commission renewed AETC's licenses subject to reporting conditions in order to monitor the licensee's EEO efforts and assure itself that the licensee was doing an on-going self-assessment of the productivity of its minority recruitment sources.

2. In NBMC's petition for reconsideration, it contends that the Commission erred by: (1) not setting out the particulars of a complaint from a former employee alleging that AETC engaged in employment discrimination; (2) rejecting the complaint because it was unsupported by the affidavit of someone having personal knowledge of the facts alleged; (3) failing to conduct an inquiry to determine whether the presence of the complaint, combined with the alleged EEO deficiencies noted in its petition to deny, were the result of intentional discrimination; and (4) failing to adhere to precedent by ordering AETC to file its first EEO report approximately one year rather than 30 days after the release date of our *Order*. NBMC requests that the Commission conduct a *Bilingual* [3] investigation of the licensee's EEO performance during the 1982-1987 license term and designate the applications for hearing.

3. The licensee contends in its petition for reconsideration that the Commission's emphasis on tracking referrals is misplaced but that it nevertheless did engage in self-assessment of its EEO efforts during the license term.[4] The licensee also complains that the Commission failed to give adequate credit to its EEO efforts and employment profile. Therefore, AETC requests that the Commission reconsider the *Order* and rescind the reporting requirements.

4. In their petitions for reconsideration, NBMC and OC/FC[5] allege that the licensee violated Section 73.3527(a)(7) of the Commission's Rules by not preparing and placing in its public files an issues-programming list. Therefore, they request that the licensee's renewal applications be designated for hearing on this issue.[6]

5. Reconsideration is appropriate where the petitioner shows either a material error or omission in the original order or raises additional facts not already considered. *E.g., WWIZ, Inc.*, 37 FCC 685, 686 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967 (1966); 47 C.F.R. Section 1.106 (c). Applying this standard, reconsideration shall be granted with respect to AETC's issues-programming lists because information concerning the licensee's noncompliance with our rules was not available until the day before the original *Order* was adopted and was not considered in that *Order*. As to the EEO issues raised by NBMC and AETC, reconsideration of the Commission's *Order* is not appropriate. We shall, however, address the petitioners' arguments to clarify the record.

6. *EEO*. NBMC initially contends that the Commission committed reversible error by not specifying the particulars of a complaint against AETC by a former employee who alleged that the licensee discriminated against minorities. In addition, NBMC argues that the Commission erred by rejecting the complaint because it was unsupported by the affidavit of someone professing to have personal knowledge of the facts alleged. NBMC maintains that because there is no such affidavit requirement under Section 1.16 of the Commission's Rules, the Commission's reason for rejecting the complaint is invalid. NBMC misconstrues the Commission's determination concerning this complaint. In dismissing the complaint, we indicated that it failed to include specific "allegations suggesting that any [licensee] act or omission was premised on illegal discrimination." We have reviewed the complaint again and we affirm that determination. In this regard, we also note that the complainant has not sought reconsideration of our initial decision. Furthermore, although the *Order* was unclear on this point, we noted that the complaint was unsupported (either by affidavit or by an unsworn statement under penalty of perjury) by someone professing to have personal knowledge of the facts alleged. *C. f.* 47 U.S.C. Section 309 (d). In this regard, we have made clear that complaints from persons with no personal knowledge of alleged discriminatory acts do not raise any question warranting further Commission action. *See Storer Broadcasting Company*, 56 RR 2d 243 (1984); *Mississippi Authority for Educational Television*, 79 FCC 2d 577, 579-80 (1980). Accordingly, we found that the complaint raised no substantial and material questions of fact.

7. NBMC also argues that "the presence of such a complaint, combined with the other factors noted in the petition to deny, should have caused the Commission to investigate further to determine whether the licensee practices discrimination." We disagree. The Commission determined that no substantial and material questions of fact existed in light of: (i) the absence of any evidence suggesting discrimination; (ii) the licensee's contacts with numerous recruitment sources, including the Urban League and the NAACP, the Arkansas Human Development Cor-

poration, the Arkansas Department of Education, the state employment office, two area colleges with significant minority enrollments, and various publications, which produced 150 referrals; (iii) the licensee's willingness to train and hire blacks and other minorities; and (iv) the licensee's employment of blacks and other minorities overall and in upper-level positions throughout the license term. In view of the above, the Commission had sufficient information to find that AETC's license term record was not the result of discrimination.

8. Finally, NBMC argues that the Commission erred by not providing an explanation as to why the EEO conditions imposed on the licensee differ substantially from the EEO conditions imposed routinely on other stations. NBMC argues that the conditions imposed on AETC became effective 381 days after the *Order* was released while the conditions imposed on other licensees became effective within 30 days from the release date of the respective orders. NBMC maintains that there is no logical reason not to protect the public for the one year period between the effective date of the *Order* and the date on which the first conditional renewal report is due.

9. NBMC's argument is without merit. As we have previously stated, the Commission enjoys broad discretion in selecting and imposing sanctions. *See National Capital Christian Broadcasting, Inc.*, 3 FCC Rcd 1919 (1988); *Leflore Broadcasting Co., Inc. v. FCC*, 636 F.2d 454, 463 (D.C. Cir. 1980). Also, in light of the recent revisions of the EEO rule in *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), our decision to require that the licensee submit reporting conditions approximately one year from the date that conditions were imposed will enable the licensee to comply fully with these requirements. The Commission has put the licensee on notice concerning the information that it expects the licensee to collect, assess and submit.

10. Moreover, there is no reason to believe that the public interest will be better protected by requiring the submission of an EEO report within 30 days from the release date, than if, as here, a report is submitted within one year from the release date. Because the licensee has a year to collect the information specified in the *Order*, the Commission is assured that the licensee has adequate data from which to analyze its efforts and modify those efforts where appropriate. As such, the public interest is fully protected. In this regard, we note that in the most recent decisions where we have imposed reporting conditions, alone or in addition to other sanctions and remedies, licensees have been required to submit their first renewal report within one year from the release date of the order. *See, e.g., Station WOWW*, 5 FCC Rcd 191 (1989); *WLVK-FM*, 5 FCC Rcd 194 (1989); *WQSF - FM*, 5 FCC Rcd 213 (1989); *WBBE / WMGB - FM*, 4 FCC Rcd 8255 (1989); *Florida Television Renewals*, 3 FCC Rcd 1907 (1988); *Catawba Valley Broadcasting Company, Inc.*, 3 FCC Rcd 1913 (1988).

11. In its petition for reconsideration, AETC contends that, contrary to the Commission's findings, it engaged in self-assessment of its EEO efforts during the 1982-1987 license term. AETC asserts that as a result of its self-assessment, it expanded its referral sources to include local and statewide newspapers, national trade publications, such as *Current* and *Broadcasting* magazine, the Corporation for Public Broadcasting's Talent Bank, and the *Arkansas State Press*, a black newspaper. Moreover, AETC argues that the Commission's belief that tracking referral sources is an essential element of self-assessment is misplaced. AETC maintains that the only purpose of tracking referral sources is to enable a licensee to shorten its list of recruitment sources. As such, AETC contends that tracking referral sources is of little, if any, benefit in identifying new and productive recruitment sources. AETC asserts that because it continually expands its list of recruitment sources, its inability to trace referral sources has no detrimental impact on its EEO efforts.

12. We disagree that AETC engaged in meaningful self-assessment during the 1982-1987 license term. Although the licensee's EEO program listed 20 recruitment sources, it was unable to determine the number of referrals that it had obtained from 15 of these sources. Also, we pointed out in the *Order* that, notwithstanding the licensee's acknowledgement in Section VII of its EEO program that a sufficient number of minorities were not applying for available positions, steps were not taken to try new and varied recruitment sources. Contrary to AETC's assertion that it continually expands its recruitment efforts, we found that it had proposed to utilize many of the same sources that were unproductive in the past. While AETC now seeks to characterize its contacts with several traditional media and other referral sources as evidence that it engaged in self-assessment, the licensee's record, as reviewed in our *Order*, failed to demonstrate that self-assessment occurred. The recruitment sources now identified as evidence of AETC's self-assessment include two "minority sources": a minority newspaper contacted after the filing of the petition to deny by NBMC/NAACP and after the end of the license term, and the Corporation for Public Broadcasting's Talent Bank. While we believe that this recruitment modification is a step in the right direction and can be considered in the next renewal period, it does not reflect self-assessment and efforts during the license term under review. Thus, we found that AETC did not engage in self-assessment during the license term and granted the renewal subject to reporting conditions. We wish to emphasize that meaningful self-assessment of recruitment efforts occurs when a licensee reviews periodically its efforts in this area in light of the relevant labor force to determine the number of minority and female referrals it has obtained, the sources producing these referrals, and, in the event that a sufficient number of minority and female applicants are not applying, the steps necessary to obtain qualified minority and female applicants.[7] As part of their self-assessment, licensees should also analyze periodically their efforts to hire, employ and promote minorities and females.

13. AETC also argues that the Commission failed to credit all its EEO efforts and employment profile. AETC points out that in addition to the recruitment efforts noted above, it trained and hired minorities. AETC also notes that at the time it filed its renewal application, minority representation (13.3%) on its full-time staff substantially exceeded the Commission's processing guidelines.

14. We carefully considered and fully discussed the licensee's EEO record in our original *Order*. *See* 3 FCC Rcd at 1925. In our view, AETC's arguments do not demonstrate either a material error or omission. Nevertheless, with respect to the licensee having met our processing guidelines, we wish to emphasize again that meeting or exceeding our processing guidelines does not

demonstrate that adequate EEO efforts were made. As we pointed out in the *Order*, the processing guidelines are simply an administrative tool. As such, they are neither quotas nor upper limits for the employment of minorities and women.

15. *Issues - Programming Lists*. By letter dated February 19, 1988, the licensee voluntarily disclosed to the Commission that it had not placed its issues-programming lists in the station's public inspection file until a few weeks prior to the February letter. It also provided an explanation in the letter as to why the required information was not in the public file. On May 4, 1988, NBMC filed a petition for reconsideration of the Commission's April 4, 1988, renewal grant in this case. NBMC alleges that the licensee failed to place any issues/programming lists in its public file as required by Section 73.3527 (a)(7) of the Commission's rules. It also contends that the licensee provided false information in its original renewal application by representing that it had placed issues-programming lists in its public file.

16. In explaining its failure to comply with the requirement, the licensee's February 1988 letter and opposition to the petition state that the numerous personnel changes during the license term involving employees responsible for preparing and maintaining the issues lists resulted in oversight and miscommunication among successive personnel. While it was generally assumed during the license term and at the time the stations' renewal applications were prepared that the issues lists were being maintained, AETC now acknowledges that this was not the case. AETC further states that it was not until January of 1988, five months after its present Executive Director, Donovan Rinker, assumed control of the stations that it was discovered that the public file did not contain the required program issues lists. Instead, the public file contained the monthly PBS program topics listing and reports of all other programming locally produced by AETC that was broadcast over the stations. The reports containing the locally produced programming provided a description of each program broadcast. Also, the entire program logs of the stations were available. In his sworn statement, Mr. Rinker states that on January 21, 1988, he realized that the KETS(TV) renewal application had erroneously reported compliance with the Commission's requirements regarding program issues lists. In any event, AETC indicates that by February 18, 1988, the program issues lists were compiled from the AETC reports, PBS's program topic listings, and the stations' program logs, all of which were placed in the public file during the license term. On February 24, the Commission was advised by AETC of the oversight, one day before the open meeting, and that the proper program issues lists had been compiled and placed in the station's public file. AETC also indicated that directives had been distributed to station personnel outlining procedures to ensure that the proper program issues lists will be prepared and maintained in the stations' public file in the future. AETC has submitted sworn statements of past and present employees to support its explanation and Mr. Rinker's avowals.

17. We have reviewed the facts regarding KETS(TV)'s issues-programming lists. While we find that the licensee has not complied with the rule, and, in fact, it admits that it has not complied with the rule, it appears that there was no intent on its part to either violate the rule or misrepresent to the Commission its failure to comply. Prior to any Commission action on the renewal application of KETS, AETC discovered its omission and voluntarily notified the Commission that the station inadvertently failed to maintain issues-programming lists during the license term. The petitioners have not shown any failure of AETC to broadcast programming that was responsive to the issues facing its community of license. Nor has the Commission received any letters of complaint from the stations' viewers regarding the stations' programming during the renewal period, which could indicate that the station was not responsive to community issues. Further, it is not refuted that AETC kept a listing and description of most of the programming broadcast, and maintained in its public file daily program logs setting forth all of the programs broadcast during the renewal period. Thus, it appears that the public was provided with a basis for ascertaining and evaluating the degree to which AETC's programming had been responsive to community issues -- the underlying purpose of Section 73.3527(a)(7) of the Commission's Rules. To facilitate the public's use and understanding of the program information required to be maintained in a station's public file, as well as to afford noncommercial educational licensees greater degrees of discretion in establishing a record of their past programming performance, we recently revised the public file rule to call for quarterly listings reflective of the licensee's "most significant treatment" of community issues, rather than the five to ten issues-programs listing previously required. *See Issues - Programs List for Public Broadcasting Licensees*, 3 FCC Rcd 1032 (1988). In light of all the factors listed above, we will not take any action against KETS(TV) at this time. However, we admonish AETC that failure to prepare and maintain its program issues lists in a manner fully complying with these new requirements can result in the imposition of appropriate sanctions in the future.

18. Accordingly, *IT IS ORDERED*, That the petitions for reconsideration filed by the National Black Media Coalition, *IS GRANTED* to the extent indicated above and *IS DENIED* in all other respects.

19. *IT IS FURTHER ORDERED*, That the petition for reconsideration filed by the Arkansas Educational Television Commission *IS DENIED*.

20. *IT IS FURTHER ORDERED*, That the pleading filed by the Office of Communication of the United Church of Christ *IS DISMISSED*.

21. *IT IS FURTHER ORDERED*, That the informal request to institute a license revocation proceeding filed by the Office of Communication of the United Church of Chirst, the First Congregational Chruch of Little Rock, Arkansas, and the National Black Media Coalition *IS DENIED*.

22. *IT IS FURTHER ORDERED*, That the Mass Media Bureau send, by Certified Mail - Return Receipt Requested, a copy of this Memorandum Opinion and Order to the licensee of KETS, the National Black Media Coalition, the NAACP, the Office of Communication of the United Church of Christ, and the First Congregational Church of Little Rock, Arkansas.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The petitions were filed by: (1) the National Black Media Coalition, the Arkansas State Conference of Branches of the NAACP and the Little Rock Branch of the NAACP (hereinafter "NBMC"); (2) the United Church of Christ and the First Congregation United Church of Christ (hereinafter "OC/FC"); and (3) the Arkansas Educational Television Commission ("AETC" or "licensee"). On July 20, 1988, NBMC and OC/FC filed a petition to institute a license revocation proceeding. Other related pleadings filed include: (i) an opposition by NBMC; (ii) an opposition to the petition for reconsideration and reply to opposition filed by the licensee; (iii) a joint reply to the opposition to the petition for reconsideration filed by OC/FC and NBMC; (iv) motions for extensions of time filed by AETC; (v) a motion to supplement its petition for reconsideration filed by AETC; (vi) a motion to strike portions of AETC's opposition to the petition for reconsideration as irrelevant filed jointly by OC/FC and NBMC; (vii) an opposition to the motion to strike portions of its opposition pleading as irrelevant filed by AETC and (viii) a joint reply to the opposition to petition to institute a license revocation proceeding filed by OC/FC and NBMC.

[2] Station KETS(TV) is one of five public television stations, all of which employ fewer than five full-time employees, licensed to the Arkansas Educational Television Commission. The headquarters of AETC, located in Conway, Arkansas, is the programming and operational center of AETC; the five stations are primarily satellites. AETC filed one EEO program and consolidated employment report to reflect its affirmative action efforts at all five stations. By our *Order*, KETS(TV) was granted renewal subject to reporting conditions. In fact, imposing reporting conditions on KETS(TV) is tantamount to imposing reporting conditions on the other four stations because all five are operated by AETC as a single entity.

[3] In *Bilingual - Bicultural Coalition on the Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978), the court stated that a substantial statistical disparity between the available minority workforce and a station's minority employment, coupled with a languishing affirmative action plan, raised questions as to whether the station's poor EEO performance is due to inadvertence or to intentional discrimination.

[4] If the Commission upholds its EEO reporting requirements, AETC seeks clarification as to whether it will be penalized for its inability to provide applicant information, such as the race or national origin, sex, or referral source, for those applicants who are not personally interviewed, and who refuse to disclose this information. Commission clarification of this issue can be found in *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 4 FCC Rcd 1715, 1716 (1989) (*NAB Clarification Order*). As we indicated therein, if a licensee cannot determine the race and sex of some of its applicants, a question may be raised as to whether, in view of all of the circumstances, the licensee had sufficient information to analyze the effectiveness of its recruitment efforts. Evaluation of such factual situations will be done on a case-by-case basis.

[5] OC/FC was not a party to the earlier proceeding. OC/FC, however, argues that its petition for reconsideration is proper because AETC did not inform the Commission of its failure to maintain the issues-program list in its public file until the day before the Commission adopted the *Order*. However, Section 1.106 (b)(1) of the Commission's Rules, 47 C.F.R. Section 1.106 (b)(1), requires non-parties such as OC/FC to demonstrate good cause as to why it was not possible to participate in the earlier stages of the proceeding. OC/FC has failed to do so. In this regard, it appears that had OC/FC reviewed the licensee's public file prior to the termination of the earlier proceeding, as it was certainly free to do, it would have discovered the omission of the issues/programming lists. Further, OC/FC furnished no information except that which had already been voluntarily filed by the licensee or was readily ascertainable by the Commission, *e.g.*, the apparent inconsistency between the representations of the application and the licensee's admission regarding this issue. Accordingly, OC/FC's pleading is dismissed.

[6] The additional pleading styled as a petition to institute a license revocation proceeding is premised on the petitioners' belief that the licensee knowingly made false statements on its renewal applications by indicating that it had kept the issues-programs lists. Neither the Communications Act nor Commission rules provide for the filing of such a pleading. However, we will treat it as an informal request for Commission action in accordance with Section 1.41 of our rules. *See MCI Telecommunications*, 3 FCC Rcd 509, 514 n.1 (1988).

[7] If a licensee obtains a meaningful pool of referrals and applicants from exclusive reliance on general sources, it will not be faulted for failing to contact minority-specific sources. On the other hand, where a licensee does not obtain meaningful results from general sources and the licensee also has failed to contact minority-specific sources, questions will be raised regarding the licensee's EEO efforts. *See Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC Rcd 1704, 1709 n.8 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-143

In re Applications of

ILLINOIS VALLEY BROADCASTING CORPORATION (hereafter "IVBC") File No. BPH-880505ME

ILLINOIS VALLEY RADIO (hereafter "IVR") File No. BPH-880505MQ

For Construction Permit for a
New FM Station in
Spring Valley, Illinois
Channel 277A (103.3 MHz)

ERRATUM

Released: April 26, 1990

The Hearing Designation Order in the above-captioned proceeding (DA 90-400), released April 16, 1990, is corrected to delete paragraph 2 and Issue 1. Through staff oversight, IVBC's August 9, 1988, timely filed amendment was not considered prior to designation for hearing.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-27

In the Matter of

GREAT AMERICAN
RADIO CORP.

Licensee of Radio Station
KCKO(AM)
Spokane, Washington

Order to Show Cause Why the
License of Station KCKO(AM),
Spokane, Washington
Should Not Be Revoked

ORDER

Adopted: April 20. 1990; Released: April 26, 1990

1. This proceeding began on February 15, 1989, when the Commission released its *Order to Show Cause and Notice of Apparent Liability*, 4 FCC Rcd 1569 (1989) (*Order to Show Cause)*. The Commission ordered Great American Radio Corp. (hereinafter Great American or licensee) to show cause why its license for KCKO(AM) should not be revoked.[1] The Commission specified an issue: "To determine whether Great American Radio Corp. violated Sections 73.1740(a)(4) and/or 73.1750 of the Commission's Rules."[2] The Commission also specified an issue to determine in light of the evidence adduced whether Great American possesses the requisite qualifications to remain a Commission licensee. By letter to the Presiding Judge dated March 17, 1989, KCKO(AM) principal Brent Larson indicated that he wished to cooperate fully in the instant proceeding and to avoid a hearing. He stated his belief that the license for KCKO(AM) had been surrendered to the Commission for cancellation years ago. On March 27, 1989, by letter to the Chief, AM Branch, Larson requested cancellation of the license.

2. By *Order* released April 19, 1989, FCC 89M-1208, Chief Administrative Law Judge Thomas B. Fitzpatrick terminated this proceeding and certified this matter to the Commission for disposition pursuant to Section 1.92(c) of the Commission's Rules. By Letter to Brent Larson dated April 25, 1989, the Chief, AM Branch, cancelled the KCKO(AM) license and deleted the call sign.

3. Since the KCKO(AM) license has been cancelled, at the licensee's request, the above-captioned revocation proceeding has become moot. Accordingly, the Commission hereby ORDERS that this proceeding is TERMINATED. This action is taken by delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] Although the Commission's *Order to Show Cause* included a *Notice of Apparent Liability* for willful or repeated violations of Commission rules, because of the action taken herein, no forfeiture is being imposed.

[2] Section 73.1740(a)(4) provides:

> (4) In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. no later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

COAST TV Santa Barbara, California	**MM DOCKET NO. 84-934** File No. BPCT-840720KG
MISSION BROADCASTING CORPORATION Santa Barbara, California	**MM DOCKET NO. 84-935** File No. BPCT-840723KI
SOLAR TELEVISION, INC. Santa Barbara, California	**MM DOCKET NO. 84-936** File No. BPCT-840723KJ

For Construction Permit
for a New Television Station

MEMORANDUM OPINION AND ORDER

Adopted: April 5, 1990; Released: April 27, 1990

By the Commission:

1. The above-captioned applications for a new television station on Channel 38 at Santa Barbara, California are mutually exclusive. In an Initial Decision, Administrative Law Judge Edward Luton granted Coast's application and denied the competing applications filed by Solar and by Mission. *Coast TV*, 1 FCC Rcd 34, 44 ¶ 103 (ALJ 1986). In doing so, the ALJ awarded all three applicants 100 percent quantitative integration credit, but concluded that Coast's integration proposal was qualitatively superior to that of either Mission or Solar. *Id.* at 44 ¶ 103.

2. The Review Board reversed the ALJ's conclusion that all three applicants deserved 100 percent quantitative credit for their respective integration proposals. *Coast TV*, 2 FCC Rcd 2982 (Rev. Bd. 1987). It determined that Coast's integration proposal deserved a maximum of only 30.74 percent credit, and that Solar's integration proposal could not be given any credit at all. *Id.* at 2983 ¶ 7; 2985 ¶ 16. Having concluded that Mission was entitled to at least 73.7 percent credit for its integration proposal, the Board found that Mission was the comparatively superior applicant, granted Mission's application, and denied the competing applications of Solar and Coast. *Id.* at 2985 ¶ 17.

3. Both Coast and Solar filed applications for review of the Review Board's Decision. Each argued that the Board had improperly reduced the 100 percent integration credit that the ALJ had awarded for its own integration proposal. The Commission agreed with the Board that Coast deserved no more than 30.74 percent quantitative integration credit. *Coast TV*, 4 FCC Rcd 1786, 1787-88 ¶ 11 (1989). In affirming the award of at most 30.74 percent credit for Coast's integration proposal, the Commission rejected Coast's claims that the Board retroactively applied subsequently developed changes in Commission law and discriminately applied the burden of proof as between Coast and Mission. *Id.* at 1787-88 ¶¶ 9-11.

4. The Commission found, however, that the Review Board had improperly discredited Solar's integration proposal. Relying on its holding in *Victory Media, Inc.*[1] that an applicant need not have written documentation of its ownership structure on the B cut-off date, the Commission rejected the Board's conclusion that Solar's integration proposal was too tenuous to merit any comparative credit. 4 FCC Rcd at 1788 ¶ 15. Based upon its review of the pertinent record evidence concerning Solar's organizational structure, the Commission determined that Solar had adequately demonstrated the legitimacy of its corporate structure and that it deserved 100 percent quantitative credit for its integration proposal. *Id.* at 1788-89 ¶ 16. Because the Board had not ruled on certain exceptions concerning Solar's application and because it had not specifically ruled on the extent of the quantitative integration credit due Mission, the Commission remanded this case to the Board for further consideration. *Id.* at 1789 ¶¶ 17-18.

5. On March 27, 1989, Mission filed a Petition for Reconsideration or Other Appropriate Relief and a Contingent Petition for Waiver. Coast also filed a Petition for Reconsideration on March 27, 1989, and an Erratum thereto on March 29, 1989. In a Consolidated Motion, filed on April 7, 1989, Solar requested that the Commission strike the petitions for reconsideration filed by Mission and by Coast. In response, Coast and Mission filed Oppositions to Consolidated Motion to Strike on April 14, 1989 and April 18, 1989, respectively. Finally, Mission filed an Opposition to Coast's Petition for Reconsideration on April 10, 1989, to which Coast filed a Reply on April 19, 1989.

6. As Solar contends in its Motion to Strike, the petitions for reconsideration filed by Mission and by Coast are procedurally deficient. Section 1.106(a)(1) of the Commission's rules, 47 C.F.R. § 1.106(a)(1), expressly states that, except where a designation order precludes the petitioner's further participation in the proceeding, a petition for reconsideration of an interlocutory order will not be entertained. *See* also *California Broadcasting Corp.*, 59 RR 2d 739, 740 ¶ 3 (1985). Notwithstanding petitioners' claim that the February 23, 1989 order is final to the extent that it disposed of matters raised in the applications for review, the Commission's order remanding this proceeding to the Review Board is clearly interlocutory. Before the Review Board issues its decision on remand, further consideration of the Commission's February 23, 1989 order is therefore premature. Once the Board acts, petitioners will have an opportunity, if it is decisional, to present further arguments concerning the integration credit awarded to each of the applicants. Accordingly, there is no reason to construe the Commission's order to be final, as Mission and Coast urge.[2]

7. Nevertheless, we take this opportunity to clarify certain aspects of our finding that Coast deserves only at most 30.74 percent quantitative integration credit. Coast is a limited partnership with three general partners (who together have a 30.74 percent equity interest) and nine limited partners (who hold the remaining 69.26 percent

equity interest). The limited partnership agreement was executed before Coast filed its application. In upholding the Board's award of at most 30.74 percent integration credit to Coast, the Commission found "ample evidence" to disregard Coast's formal ownership structure. *Coast TV*, 4 FCC Rcd at 1789 ¶ 9. Based upon "actions by the limited partners go[ing] beyond the permissible functions of limited partners," the Commission agreed with the Board that the three general partners would not be the only active, controlling owners. *Id.*

8. We perceive no basis for modifying our award of no more than 30.74 percent quantitative credit for Coast's integration proposal. At the outset, we reiterate that integration credit is due when the applicant sets forth a specific integration proposal; the applicant adheres to that proposal; and there is reasonable assurance that the plan will be carried out. *See, e.g., Pacific Television, Ltd.*, 3 FCC Rcd 1700, 1700 ¶ 5 (1987) (citing *Bradley, Hand & Triplett*, 89 FCC 2d 657, 662 (Rev. Bd. 1982)). The record before us in this case indicates that Coast's so-called limited partners have been involved in exercising influence and control over partnership affairs. In the absence of other persuasive evidence that the limited partners will be no more than passive investors, there is no reason not to attribute their ownership interests to Coast for integration purposes. *See Anax Broadcasting Inc.*, 87 FCC 2d 483, 488 ¶ 15 (1981).

9. To restate the facts briefly, the record reflects that before Coast's application was filed, its principals entered into a partnership agreement whereby there would be three general partners and nine limited partners. Notwithstanding this agreement, the "limited" partners thereafter engaged in activities that go beyond what is permissible for a limited partner. These activities, which included active participation in initiating the application and in arranging for its financing, continued for at least three weeks *after Coast filed its application representing that these owners would be limited partners*. 4 FCC Rcd at 1789 ¶ 9.

10. This apparent departure from the partnership agreement, whereby exclusive authority for management and control of the partnership purportedly would lie with the three general partners, has not been satisfactorily explained. Thus, we have no assurance that the parties will abide by the partnership agreement, and that, in accordance with the terms of that agreement, the three general partners will have exclusive managerial authority over the affairs of the partnership. Under these circumstances, we concluded that all partners must be considered active owners for integration purposes. Therefore, we held that the proposal that three of the twelve partners (having a combined equity interest of 30.74 percent) be integrated into the management of the station merits at most 30.74 percent quantitative integration credit.

11. Coast argues, however, that award of only 30.74 percent integration credit cannot be reconciled with the award of 100 percent credit in *Victory Media, Inc.* In *Victory*, an applicant with one voting stockholder and two non-voting stockholders sought 100 percent credit for its proposal that the voting stockholder would be integrated into the management of the station. In crediting Victory's proposal, the Commission determined that the non-voting stockholders' significant role in initiating and financing the application did not demonstrate a sham application or that the voting stockholder would have less than exclusive managerial authority in operation of the ongoing licensee. 3 FCC Rcd at 2074 ¶ 9, 2075 ¶ 18.

12. There is merit to Coast's contention that the activities that were found to belie the passive status of its limited partners in this case have some similarity to those of the non-voting stockholders in *Victory*. Coast is also correct that the involvement of its limited partners ended less than three weeks after the application was filed and a month before the B cut-off date, whereas examination of the record reveals that the involvement of the non-voting stockholders in *Victory* continued after the B cut-off date. Finally, as Coast urges, its limited partners, unlike Victory's non-voting stockholders, did not provide legal services to the applicant. Nevertheless, as explained below, we are unpersuaded that Coast deserves 100 percent integration credit for its proposed integration of only three of its twelve owners.

13. In awarding the applicant in *Victory* 100 percent quantitative credit for the proposed integration of its only voting stockholder, the Commission recognized the critical role that the non-voting stockholders had played in the formation and prosecution of the application. It held, however, that "non-voting stockholders -- unlike limited partners, who must be specifically insulated from general partners -- are by definition prohibited from influencing or controlling corporate activities." 3 FCC Rcd at 2074 ¶ 14, citing *Attribution of Ownership Interests*, 97 FCC 2d 997, 1020-21 (1984), recon. granted in part, 58 RR 2d 604, 615 (1985), further recon. granted in part, 1 FCC Rcd 802, 803-04 (1986). Given this premise, the Commission held that the lack of bylaws or other documentation outlining how the corporation would work was not fatal to Victory's otherwise apparently valid integration proposal. It was in this narrow context that the Commission held that the involvement of Victory's non-voting stockholders in the formation and initial prosecution of the application "did not demonstrate a sham application or who w[ould] control the ongoing business." 3 FCC Rcd at 2075 ¶ 18.

14. In *Victory*, none of the parties focused upon the fact that Victory's non-voting stockholders continued to be involved after Victory filed an application purporting to be a corporation with two classes of stock and representing that these two owners would be non-voting stockholders. Therefore, the Commission had no occasion to consider in *Victory* whether the owners' continuing role in prosecuting the application after this corporate structure was adopted could be reconciled with their purported passive status as non-voting stockholders. Nor did the Commission address the fact that one of Victory's non-voting stockholders also served as legal counsel for the applicant until more than nine months after the B cut-off date.

15. To the extent that *Victory* inadvertently suggested that the involvement of an allegedly passive owner in an applicant's activities after the applicant has adopted a bifurcated form of business organization is irrelevant to the question of whether that owner will exercise influence over the management of the applicant in the future, it is hereby expressly overruled. On further reflection we hold that, where a "passive" owner is shown to be materially involved in the applicant's activities after that owner has been held out as a passive investor, that owner's interest will be considered for comparative purposes. [3] Where an applicant adopts an ownership structure under which a particular owner is to be a limited partner (or a non-voting stockholder), that owner's subsequent participation in any aspect of decisionmaking raises a question as to

whether he will, in accordance with the applicant's ownership structure, have a passive, rather than an active, role in the management of the ongoing licensee. This is true whether the involvement of the allegedly passive owner is continuing or whether that involvement has ended. In the case of an owner who, contrary to a restrictive provision of the applicant's enabling charter, remains involved in the management of the ongoing business for a period of time, the Commission has no guarantee that the owner will not resume an active role in the future. For this reason, the fact that the involvement of the so-called limited partner related only to obtaining a broadcast license and not to operating an ongoing licensee is not a basis for concluding that the limited partner will in fact have a passive, rather than an active, role in the management of an ongoing licensee. Nor is an owner's current inactivity a basis by itself for disregarding his equity interest for integration purposes, in light of his past involvement.

16. In summary, where an owner has assumed an active role after the applicant has declared that that owner will be passive, that owner's equity interest will be attributed to the applicant for integration purposes regardless of the nature of the "passive" owner's involvement. In contrast, where an applicant adopts an ownership structure providing that a previously active owner will now have a passive role and thereafter adheres to that changed ownership structure without exception, the Commission ordinarily has reasonable assurance that the once active owner will not exercise any control or influence over the management of the ongoing licensee.[4] Under those circumstances, we will not attribute the equity interest of a passive owner to the applicant for integration purposes even though that owner may have been active in initiating or financing the application before the applicant adopted an ownership structure specifying a passive role for that owner.[5] Our treatment of start-up activities in this manner is consistent with our interest in deterring the filing of sham proposals. As we said in *Victory*, "we will not hesitate to discredit the integration proposals of applicants where we are presented with convincing evidence that limited partners or non-voting shareholders are or will be in fact exercising influence or control over the ongoing business." 3 FCC Rcd at 2074-75 ¶ 18.[6]

17. Applying these principles to the facts of this case, neither the fact that the involvement of Coast's limited partners was confined to the type of start-up activities discussed in *Victory* nor the fact that these activities ended before the B cut-off date supports the award of 100 percent integration credit. The relevant fact is rather that these activities occurred after Coast filed its application purporting to be a limited partnership. Given this departure from the partnership agreement and the lack of persuasive rebuttal evidence from Coast, there is no reason not to attribute the equity interests of Coast's "limited" partners to the applicant for integration purposes. *See Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6129 ¶ 27 (Rev. Bd. 1987), rev. denied 3 FCC Rcd 4541 (1988); see also *Magdalene Gunden Partnership*, 3 FCC Rcd 7186, 7186 ¶ 6 (1988), recon. denied, FCC 90-121 (April 5, 1990). Therefore, Coast's proposal that only three owners, holding combined equity interests of 30.74 percent, be integrated into the management of the proposed station deserves no more than 30.74 percent quantitative integration credit.

18. ACCORDINGLY, IT IS ORDERED, That the Contingent Petition for Waiver, filed on March 27, 1989, by Mission Broadcasting Corporation IS DENIED; that the Consolidated Motion to Strike Petitions for Reconsideration, filed on April 7, 1989, by Solar Television, Inc. IS GRANTED; and that the Petitions for Reconsideration, filed on March 27, 1989, by Mission Broadcasting Corporation and by Coast TV ARE DISMISSED.

19. IT IS FURTHER ORDERED, That the Commission's decision in *Coast TV*, 4 FCC Rcd Rcd 1786 (1989), IS MODIFIED as reflected herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] 3 FCC Rcd 2073 (1988), settlement agreement approved, 4 FCC Rcd 368 (1988), proceeding terminated, FCC 89I-01 (Jan. 6, 1989).

[2] Although Mission has filed a contingent request for waiver of section 1.106, it raises no matters in its petition for reconsideration that were not fully considered in the Commission's remand order. Thus no further discussion of its petition for reconsideration would be warranted, even if we were to grant Mission a waiver of the rule.

[3] We remain of the view that under certain circumstances an owner who participates in the filing or financing of an application may subsequently take on a passive, nonattributable role in the management of the ongoing licensee so as to be excluded from comparative consideration. We have never meant to suggest, however, that active participation by assertedly passive owners after the applicant holds itself out as either a limited partnership or a corporation with non-voting stock, even during the start up phase, is permissible. To the contrary, such activity by an owner in the face of organizational documents or other claims indicating passive status sharply undermines the owner's claim to passive treatment. *See Tulsa Broadcasting Group*, 3 FCC Rcd 4541, 4541 ¶ 2 (1988). Of course, so long as such start-up activities occur before the applicant has adopted a bifurcated form of business organization and before the time for filing amendments as of right has expired, they do not in and of themselves raise a question about the validity of the applicant's proposal. As noted above, an applicant may amend any aspect of its comparative proposal, including its ownership structure, as a matter of right on or before the B cut-off date. 47 C.F.R. § 73.3522. Thus, an applicant can change its ownership structure on or before the B cut-off date to specify that an owner who had been active would now be passive. In the absence of evidence that the previously active owners will continue to be active after the amendment, integration credit would be awarded based on the amended proposal. In this case, the involvement of Coast's so-called limited partners in partnership affairs continued even after it adopted its limited partnership agreement. Thus, the provisions dealing with amendments as of right are irrelevant for Coast's proposal.

[4] This reasonable assurance can be undermined, of course, when the totality of the facts otherwise indicates that an applicant's ownership proposal is not *bona fide*. *See* generally, *KIST Corp.*, 102 FCC 2d 288, 292-93 (1985).

[5] *See Cleveland Television Corporation*, 91 FCC 2d 1129, 1132 ¶ 6 (Rev. Bd. 1982), rev. denied FCC 83-235 (1983), aff'd *Cleveland Television Corporation* v. *FCC*, 732 F.2d 962 (D.C. Cir. 1984) (claimed implications of earlier activities of principals in corporate planning and decision-making prior to conversion of their stock to preferred shares is conjectural and does not establish any continuing involvement on their part). *Cleveland*, which Coast cites, does not support the contention that it deserves 100 percent integration credit, inasmuch as the activities in *Cleveland* occurred before - rather than after - active owners became passive investors by converting their interests to preferred stock.

[6] Accord *KIST Corp.*, supra. In order to facilitate the detection of such sham proposals, the Commission has amended FCC Form 301 to require applicants to submit additional ownership information with their applications. *Revision of Application for Construction Permit for Commercial Broadcast Station*, 4 FCC Rcd 3853, 3855-58 ¶¶ 19-38 (1989). Under revised Form 301, applicants not filing as individuals must provide, among other things, the date and place of filing of their enabling charter; identify all holders of nonattributable equity in the applicant except where there are more than 50 owners of equity interests; and identify and submit future ownership contracts and agreements. 4 FCC Rcd at 3856 ¶ 25. Those revisions do not apply to any applications, such as those before us in this proceeding, which were filed before June 26, 1989 when the revisions became effective. *Id.* at 3861 ¶ 61.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-399

In re Applications of

NEWTON TELEVISION LIMITED	File No. BPCT-850827KJ
NEWTON TELEVISION, INC.	File No. BPCT-850828KK
VANGUARD BROADCASTING	File No. BPCT-850828KU
PRESS BROADCASTING COMPANY	File No. BPCT-850828KV
NEWTON BROADCASTING COMPANY, LTD.	File No. BPCT-850828KY
MOUNTAIN BROADCASTING CORPORATION	File No. BPCT-850828LA

For Construction Permit for a
New UHF Television Station at
Newton, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: April 18, 1990; Released: April 27, 1990

By the Commission:

1. In a Memorandum Opinion and Order, *Newton Television Limited*, 4 FCC Rcd 2561 (1989), we modified and affirmed a Review Board Decision, *Newton Television Limited*, 3 FCC Rcd 553 (Rev. Bd. 1988), granting the above-described application filed by Mountain Broadcasting Corporation. Now before us are petitions for reconsideration and associated pleadings, as well as certain other filings.[1] For the reasons that follow, we modify our earlier decision but reaffirm the result in this case.

I. THE PETITIONS FOR LEAVE TO AMEND

2. Each of the applicants in this proceeding originally specified the same antenna site which is owned by AT&T. In a letter dated April 13, 1989, AT&T advised Vanguard that because of a "change in company policy" the site would no longer be available. (The letter is included as an attachment to Vanguard's April 24, 1989 petition for reconsideration). In response to the loss of the AT&T site, Vanguard, NTI, Press, NBC and Mountain petitioned for leave to amend to specify new antenna sites.[2]

3. Vanguard argues that only it filed a timely petition for leave to amend. The other petitions for leave to amend were all filed over 30 days after Vanguard's April 24, 1989 petition for reconsideration, which gave the other applicants notice that the site was no longer available. Consequently, relying on 47 C.F.R. § 1.65 which provides that amendments should be filed as promptly as possible and in any event within 30 days, unless good cause is shown, Vanguard submits that those late filed amendments should be rejected because the petitioners have not shown good cause for their acceptance.

4. We disagree. Here, the petitioners were required to locate and obtain consent for use of new sites, conduct engineering studies, and then amend their applications. Each of the amending applicants effectively asserts that the loss of its old transmitter site was unforseen and involuntary, that it acted promptly and diligently in securing a new site, that no comparative advantage was being sought, and that good cause exists for accepting the amendments. In contrast, Vanguard's opposition is premised upon a failure to comply with the narrow 30 day period specified in 47 C.F.R. § 1.65. However, Section 1.65 specifically allows an exception to the 30 day limitation when good cause is shown. Although Vanguard contends that good cause does not exist in this situation, it has not made any showing rebutting the other applicants' submissions. Under these circumstances, and given the complexity of the tasks involved, it would be unreasonable to reject any amendment merely because it was not filed within 30 days. Rather, we find that each of the petitioners acted with due diligence under the situation then arising and that good cause for acceptance of their amendments has been shown.

5. Vanguard also contends that Mountain was aware of the loss of its transmitter site prior to March 24, 1989 and that this proceeding should be remanded to determine whether Mountain purposely withheld that information from the Commission. Vanguard asserts that sometime before March 24, 1989 it was advised that representatives of Mountain were searching for a new site in the Newton area and that they had told numerous persons that their search was necessary because of the loss of the AT&T site. Opposition to Petition to Amend filed June 12, 1989 by Vanguard. In a declaration submitted under penalty of perjury, Rev. Sun Young Joo -- Mountain's majority stockholder, president, treasurer, and chairman of its board of directors -- states that Mountain had no reason to believe that its proposed transmitter site would be unavailable until it was served with Vanguard's petition for reconsideration. Opposition to Petition for Reconsideration, filed May 9, 1989 by Mountain, Exhibit A. Vanguard has not refuted Rev. Joo's statements with affidavits from persons with personal knowledge of the facts. Consequently, based upon the information before us, Vanguard's contentions are based on speculation and there is no reason to question the veracity of Rev. Joo's declaration. Accordingly, Vanguard's request to further explore this matter in a remanded hearing is denied.

II. THE EFFECT ON THE COMPARATIVE EVALUATION

6. In its petition for reconsideration, Vanguard urges us to remand this proceeding for further hearing in light of applicants' amendments specifying new transmitter sites. According to Vanguard, the existing record in this case can no longer provide a basis for a comparative determination because of those amendments. It asserts that operation of the proposed stations from the new transmitter sites will result in a change in the signal coverage of each of the applicants and, thus, require a reevaluation of each of the applicants' comparative coverage showings as well as any enhancement credits claimed for local residence and community activities in the previously proposed service areas.

7. To the extent that Vanguard is contending that it or some of the other applicants could now be preferred over Mountain for signal coverage and qualitative enhancements based on local residence and community activities, we find no basis for such a contention. As the Bureau pointed out in its comments in support of the transmitter site amendments, none of the applicants in this proceeding is entitled to claim a comparative advantage as a result of these amendments, citing *Women's Broadcasting Coalition*, 59 RR 2d 730 (1980), which disallowed any comparative upgrading resulting from a transmitter site change that was effectuated by the applicant via a post cut-off date amendment. To the extent, however, that Vanguard argues that the coverage preference and the enhancement credits for local residence and community activities, which were previously awarded Mountain, may have been negated by the change in its transmitter site, we will reconsider the comparative evaluation of the applicants in this proceeding. Assuming, without deciding, that Mountain is no longer entitled to credit for those factors, it nevertheless remains the clear comparative winner in this proceeding.

8. In its Decision, the Board adopted the ALJ's findings and conclusions with slight modifications not relevant here. 3 FCC Rcd at 553 ¶ 2. However, the Board did not specifically discuss the exceptions of the other applicants because it concluded that Mountain would be preferred because of its superior coverage proposal and the qualitative enhancement of its integration proposal, even if the other applicants also were awarded 100 percent integration credit. 3 FCC Rcd at 556 ¶ 11. In affirming the grant of Mountain's application we relied on, among other things, its 100 percent quantitative integration proposal. 4 FCC Rcd at 2562 ¶ 6. Consequently, unless it can now be demonstrated that one of the other applicants in this proceeding is entitled to more than 87.5 percent quantitative integration credit, [3] there is no need to remand this proceeding to determine what impact Mountain's transmitter site change will have on the coverage preference and on the qualitative enhancement credits previously awarded in this proceeding.

9. *NTI's Integration:* NTI claimed credit for 100 percent integration. It proposes to integrate its President and Director, Herlinda Thompson, who has an 80 percent voting interest and a 20 percent equity interest; and its Secretary/Treasurer and Director, John Harper, who has a 20 percent voting interest and a 5 percent equity interest. The ALJ, finding that Harper would not have management responsibility, refused to credit his proposed integration and awarded NTI credit for only 80 precent integration. 2 FCC Rcd at 4803 ¶¶ 125-127. NTI argues that Harper will be program manager and, thus, that he will have management responsibility. It also argues that the ALJ erred in finding that Harper only attended one Board meeting that was conducted by telephone, and that Harper's interest could be diluted by subsequent capital calls.

10. Harper testified that he will work a minimum of 40 hours a week as program director for the proposed station. He admitted, however, that Thompson would be involved in the supervision of all of the station's departments, that he would not supervise any employees, that all of the people involved in program production would report to Thompson. Tr. 144-145. Harper did not know how many employees would be involved in programming production or what kind of programming would by broadcast by NTI. Tr. 145, 155. We reject NTI's claim that Harper will have management responsibility, in light of the facts that Thompson will supervise the production employees, and that none of the employees will report to Harper. We therefore find that NTI can be credited with no more than 80 percent integration.

11. *NBC's Integration:* NBC claims 100 percent integration credit for the participation of its general partner in the management in its proposed station. The ALJ credited NBC with 81 percent integration. He attributed to NBC the 19 percent nonintegrated ownership interest of Robert Buenzle, who was listed as a limited partner. 2 FCC Rcd at 4804 ¶¶ 134-137. NBC argues that the ALJ erred because Buenzle's activities were confined to the formative stages of the applicant.

12. The record establishes that after the formation of the NBC partnership, it did not have legal counsel and that Buenzle served as counsel. The record establishes that Buenzle helped NBC's general partner locate a transmitter site, arrange for a consulting engineer, and draft and file NBC's application. Moreover, he introduced the general partner to NBC's other limited shareholder and 51 percent equity owner. He continued to advise NBC after counsel was retained. Thus, he discussed potential "B" cut-off date amendments with the general partner. Tr. 441-450.

13. We have held that "where an owner has assumed an active role after the applicant has declared that that owner will be passive, that owner's equity interest will be attributed to the applicant for integration purposes regardless of the nature of the 'passive' owner's involvement. *Coast TV*, 5 FCC Rcd , ¶ 16 (1990). Here Buenzle's involvement in NBC's partnership affairs continued after the formation of NBC. As noted above, the ALJ's findings concerning his involvement in the preparation of NBC's proposal and the filing and prosecution of its application is documented in the record. Thus, the ALJ properly attributed Buenzle's ownership interest to NBC for integration purposes, and NBC can be awarded credit for no more than 81 percent integration.

14. *Vanguard's Integration:* Vanguard is a limited partnership. On the B cut-off date, its two general partners, Catherine and Karen Fletcher, owned a 9.8 percent equity interest in the partnership. Both Fletchers propose to work full-time in the management of the station. The ALJ concluded, however, that Vanguard's limited partners were not passive investors; that they were active in Vanguard's management; and that, therefore, control of Vanguard did not rest solely with the Fletchers. 2 FCC Rcd at 4803-04 ¶¶ 128-133. The ALJ credited Vanguard with only 9.8 percent quantitative integration credit, finding

that the interests of the limited partners must be attributed to Vanguard for integration purposes. 2 FCC Rcd at 4803-04 ¶¶ 132-133.

15. The Fletchers were recruited as general partners by Vanguard's limited partners. Vanguard argues that the Fletchers were brought into the partnership shortly before the application was filed, and that as a result the Fletchers were forced to rely on the documents and the proposal prepared by the limited partners. It asserts that the Fletchers control Vanguard, that they have always intended to control the partnership, that the principals believed the limited partners' activities were authorized without requiring those interests to be attributed, and that the applicant was victimized by the narrowing of permissible limited partnership activity in Commission rulings after the formation of its partnership. *Ownership Attribution*, 58 RR 2d 605 (1985). In any event, Vanguard asserts that its limited partners engaged only in pre-organizational or formative activities, and that the ALJ erred in failing to credit its integration.

16. Vanguard's reliance on the narrowing of permissible limited partner activity in *Ownership Attribution* is misplaced. Vanguard was on notice that its limited partners could be exempted from attribution only if there was no material involvement of the partners in the management of the partnership. *Anax Broadcasting, Inc.*, 87 FCC 2d 483, 488 (1981), established the general principle, thereby giving applicants notice, that only those interests held by passive investors would be disregarded for integration purposes. *See Tulsa Broadcasting Group*, 2 FCC Rcd 6124, 6129 ¶ 27 (Rev. Bd. 1987), rev. denied 3 FCC Rcd 4541 (1988). As reflected below, Vanguard's contentions are thus without merit.

17. The activities of Vanguard's limited partners clearly warrant attribution of their ownership interests. After the filing of its application, Vanguard's Limited Partnership Agreement was amended. That amendment gave the limited partners authority to remove the general partners by a two-thirds vote without regard to cause. 2 FCC Rcd 4797-98 ¶ 62. Moreover, from its inception and for nearly eight months after Vanguard filed its application, the limited partners had exclusive control over the partnership finances. They sold limited partnership shares in the entity, distributed the money received for those shares to themselves for services rendered to the partnership and, essentially, carried out all of Vanguard's business transactions. Tr. 400-401, 409-410.

18. What is even more demonstrative of the limited partners' dominance is the fact that the Fletchers were unaware of the stock transactions when they occurred, they never saw checks for the transactions, and they were never given an exact accounting of those transactions. Tr. 261-62, 410. Thus, notwithstanding the Fletchers' intentions, the limited partners were involved in the post-organizational management of Vanguard, their interests were properly attributed to Vanguard by the ALJ, and the ALJ properly determined that Vanguard is only entitled to 9.8 percent quantitative integration credit. *See* 2 FCC Rcd 4803-4 ¶¶ 128-133.

19. Mountain is the only applicant entitled to credit for the integration of all of its controlling principals into the full-time management of its station.[4] Therefore, we affirm the findings of the ALJ and the Board, that Mountain is the superior applicant under the quantitative integration criterion -- even though we previously concluded that it was also preferred for its qualitative integration and coverage proposals. 4 FCC Rcd at 2562 ¶ 6.

III. MOUNTAIN'S FINANCIAL QUALIFICATIONS

20. In its petition for reconsideration, NTI asserts that during a meeting Mountain's president, Rev. Sun Young Joo, represented that Mountain would raise funds for the station through his church. Relying on this purported statement, NTI argues that Mountain did not have reasonable assurance of net liquid assets sufficient to build and operate its proposed station, and that this proceeding should be remanded to determine whether Mountain falsely certified that it was financially qualified when it filed its application, and whether Mountain is financially qualified to construct and operate its proposed station.

21. NTI's petition will be denied. The conversation relied on by NTI occurred in November 1987, shortly after the ALJ's Initial Decision was released and before the oral argument was conducted before the Review Board. NTI has not attempted to explain why that purported information could not have been proffered then. Consequently, the petition does not rely on newly discovered facts which could not have been presented earlier as required by 47 C. F. R. § 1.106(b)(2).

22. More importantly, Rev. Joo denies making such a statement. In a declaration submitted under penalty of perjury, he states that Mountain's finances were not discussed at that meeting; that Mountain has obtained funding assurances through conventional sources; and that it was never Mountain's intent to rely on church fund raising activities. Opposition to Petition for Reconsideration, filed May 9, 1989. NTI has not attempted to refute Rev. Joo's declaration with affidavits from persons with personal knowledge of the facts. Moreover, Rev. Joo testified at the evidentiary hearing that he had arranged bank financing for Mountain's application. Tr. 500-02. His testimony was not impeached then and his present declaration is consistent with that testimony. In view of the foregoing, we find no basis for questioning either Mountain's financial qualifications or its financial certification.

IV. CANADIAN ALLOCATION CONSIDERATIONS

23. Under *Agreement Effected by Exchange of Notes Signed at Ottawa April 23 and June 23 1952*, United States-Canada, T.I.A.S. No. 2594, the maximum effective radiated power (ERP) for United States television stations located within 250 miles of the Canadian border is 1000 kilowatts, unless the Canadian government consents to operation with a higher ERP. Canadian consent for the operation of Mountain's 5000 kilowatt station had been obtained and recognized by us when this proceeding was last before us. However, that consent was for operation by Mountain from its former transmitter site -- which is no longer available.[5] In its recent petition to amend and accompanying amendment, Mountain does not specifically address whether the operation of its station from the new site requires Canadian consent pursuant to the above *Agreement*. The Bureau likewise expresses no views in this regard in its comments in support of Mountain's petition to amend. Rather than hold this proceeding in abeyance for further submissions on this matter, we believe the public interest and the proper dispatch of the Commis-

sion's business would be better served by making a grant to Mountain on condition that Canadian consent is obtained, if necessary. If the Bureau in its analysis of Mountain's amendment specifying a new transmitter site determines that such consent is not required, it is authorized to issue a construction permit without this condition.

V. ORDERS

24. ACCORDINGLY, IT IS ORDERED That the Petitions for Leave to Amend filed May 15, 1989 and January 30, 1990 by Vanguard Broadcasting, May 31, 1989 and January 9, 1990 by Mountain Broadcasting Corporation, June 15, 1989 by Newton Broadcasting Corporation, Ltd., June 30, 1989 by Newton Television, Inc. and July 24, 1989 by Press Broadcasting Company ARE GRANTED, and the amendments attached thereto ARE ACCEPTED;

25. IT IS FURTHER ORDERED That the Petition for Reconsideration filed April 24, 1989 by Vanguard Broadcasting and the Erratum filed April 25, 1989 IS GRANTED to the extent indicated herein and in all other respects IS DENIED;

26. IT IS FURTHER ORDERED That the Petition for Reconsideration filed April 25, 1989 by Newton Television, Inc. IS DENIED;

27. IT IS FURTHER ORDERED That the application of Mountain Broadcasting Corporation (File No. BPCT-850828LA) for a construction permit for a new television station at Newton, New Jersey IS GRANTED subject to the condition that its operation with effective radiated power of 5000 kilowatts is approved by the government of Canada.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] A Petition for Reconsideration filed April 24, 1989 and an Errata filed April 25, 1989 by Vanguard Broadcasting; a Petition for Reconsideration filed April 25, 1989 by Newton Television, Inc. (NTI); Oppositions filed May 9, 1989 by Mountain; and a Reply filed May 19, 1989 by Vanguard. Also under consideration are: Petitions for Leave to Amend to specify new transmitter sites filed May 15, 1989 by Vanguard, May 31, 1989 by Mountain, June 15, 1989 by Newton Broadcasting Company, Ltd. (NBC), June 30, 1989 by NTI, and July 24, 1989 by Press Broadcasting Company; Oppositions filed June 12 and 26, 1989 by Vanguard; and Comments filed May 24, June 9 and 26 and July 12, 1989 by the Mass Media Bureau. On January 9 and 30, 1990, Mountain and Vanguard filed petitions for leave to amend their applications to include a Federal Aviation Administration determination that their new sites would not be a hazard to air navigation. Notices of Appeal have been filed by Press and NBC. *Newton Broadcasting Company, Ltd. v. FCC*, No. 89-1262 (D.C. Cir. 1989). That proceeding is being held in abeyance pending the Commission's ruling on reconsideration.

[2] Newton Television Limited did not file a petition to amend its application to specify a new site and it has not otherwise participated in these proceedings subsequent to our denial of its Application for Review. Thus, it no longer has an antenna site and its application is not entitled to further consideration in this case.

[3] *See Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5066 ¶ 18 (1989), holding that where there is a clear quantitative difference in the applicants' integration proposals, no consideration will be given to qualitative enhancement factors. There the Commission determined that a 12.5 percent difference in integration was decisionally significant.

[4] As noted in footnote 2, above, NTL is not entitled to further consideration in this proceeding. However, even if it were, the result herein would not be different in light of the ALJ's conclusion that it would be entitled, at most, to 25 percent integration credit. 2 FCC Rcd at 4803 ¶ 123.

[5] The parties' arguments regarding our taking official notice of the Canadian consent for that site (4 FCC Rcd 2561 ¶¶ 2 and 3) have been rendered moot because of the unavailability of the site.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

BELLSOUTH RM-5835

Use of Certain Generally
Accepted Accounting Principles
in Part 32 of the Commission's
Rules

MEMORANDUM OPINION AND ORDER

Adopted: April 18, 1990; Released: April 26, 1990

By the Commission:

I. INTRODUCTION

1. On November 30, 1987, BellSouth Corporation, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth) filed a petition for reconsideration of a *Debt Refinancing Order*[1] wherein the Commission decided not to amend Part 32 to include provisions similar to those contained in Part 31 for the refinancing of debt.[2] BellSouth wants the Commission to amend Part 32 to incorporate a specific provision that would permit Local Exchange Carriers (LECs) to request Commission approval to amortize expenses associated with reacquired debt over the life of the replacement debt issue. For reasons discussed in the succeeding paragraphs, we deny BellSouth's petition.

II. BACKGROUND

2. When debt is issued, the cash actually received is often different than the face amount to be paid at maturity. When the cash received is higher than the face amount, the difference is called a premium, and when the amount of cash received is less than the face amount, the difference is called a discount. These premiums and discounts adjust the value of the debt security to reflect that the interest rate at time of issue is lower or higher than the interest rate stated on the debt security. Over the term of the debt, premiums or discounts are amortized so that at maturity, the recorded amount of debt will coincide with the face amount actually owed at maturity.

3. When debt is extinguished (paid off) before its maturity, the amount actually paid out, the reacquisition cost, [3] is often different than its net carrying amount.[4] When there is a difference between the net carrying amount and the reacquisition cost, a gain or loss results from extinguishing the debt. The prescribed accounting treatment, under both Part 31 and Part 32 of the Commission's Rules[5] requires that these gains and losses associated with reacquired debt be included in the determination of net income in the period of extinguishment. However, in the case of refinancing (*i.e.*, paying off old debt with new borrowing), Part 31 permitted these gains or losses (usually losses) to be associated with the new debt and to be amortized to income or expense accounts over future periods when specific approval of the Commission had been obtained. Part 32 did not contain language that allowed carriers to request permission for this amortization treatment because such treatment is inconsistent with generally accepted accounting principles (GAAP).[6] GAAP requires that the differences between the reacquisition price and the net carrying amounts of the extinguished debt be recognized in the year of extinguishment as a loss or gain, whether refinancing is involved or not.[7]

4. BellSouth filed a Petition for Rule Making on March 26, 1987, to amend Part 32 to include language similar to that contained in Part 31, which would permit carriers to request permission for the amortization of gains or losses associated with the reacquisition of long-term debt when refinancing is involved. BellSouth contended that permitting such amortizations would often work to the benefit of ratepayers since carriers would be more inclined to refinance at lower interest rates if large losses could be deferred instead of being absorbed in the year of extinguishment.

5. The Commission was not persuaded by BellSouth's contention that such provisions for requesting approval were necessary in Part 32. In the *Debt Refinancing Order*, the Commission noted that such amortizations were inconsistent with GAAP and noted that a carrier could request a waiver to amortize gains or losses on debt reacquisitions, if it could demonstrate that such an amortization would be in the best interests of ratepayers. The Commission therefore denied BellSouth's Petition for Rule Making.

6. Subsequent to filing its Petition for Reconsideration, on January 28, 1988, BellSouth filed two separate petitions for waiver of Section 32.4240 of the Commission's Rules, 47 C.F.R. §32.4240, to allow amortization of debt refinancing expenses, including unamortized discounts and call premiums associated with reacquired debt. In a *Memorandum Opinion and Order*,[8] the Chief, Common Carrier Bureau denied BellSouth's petitions finding that the accounting prescribed under Part 32 was appropriate.

III. PETITION FOR RECONSIDERATION

7. In its Petition for Reconsideration of the *Debt Refinancing Order*, BellSouth requests that this Commission amend Section 32.4240 of the Rules to incorporate a specific provision that would permit LECs, upon Commission approval, to amortize debt refinancing expenses and unamortized discounts and premiums associated with reacquired debt over the life of the replacement debt issue, rather than requiring the LECs to recognize these costs in current period earnings and forcing LECs to obtain waiver relief. BellSouth believes that such treatment should be offered when it benefits the ratepayers. It argues that the possibility of nonrecovery of costs associated with the refinancing of debt could have a significant negative impact on a LEC's decision as to whether to refinance its debt.

8. To illustrate its point BellSouth provides examples of how a regulated LEC would be affected (1) if refinancing costs were amortized and recovered over the life of the new debt issue, and (2) if refinancing costs were written off to earnings in the same accounting period of the debt refinancing, and recovery was not allowed. BellSouth's example shows that if amortization is allowed, net income

would not be adversely affected and service rates would be adjusted for the lower cost of debt.[9] BellSouth states that ratepayers would benefit from the lower interest costs and reduced rates. Also BellSouth maintains that if there is regulatory lag in either federal or state jurisdictions, LECs would have some opportunity to increase earnings up to the allowed rate of return during the prescription period due to the reduced interest costs. However, BellSouth maintains that a LEC's net income could be adversely affected if costs associated with the refinancing of debt are absorbed in current period earnings.[10] BellSouth argues that in this case the possibility of nonrecovery, along with the threat of subsequent rate reductions, would be a strong disincentive for LECs to refinance.

9. BellSouth also argues that a regulated company would be affected differently from a nonregulated company by the application of a one time charge for debt refinancing. It states that nonregulated companies sell products at market price, and, thus, a one time charge to their earnings can be offset through higher profits in the future. BellSouth emphasizes that because of regulatory constraints, a regulated LEC's future earnings would not be allowed to increase to a level that would permit recovery from a one time charge for debt refinancing costs.

10. BellSouth disagrees with the conclusion in the *Debt Refinancing Order* that the industry average method used to determine rate of return would provide an incentive for debt refinancing under Part 32 rules. BellSouth states that if all LECs refinanced at lower rates and were denied amortization of refinancing costs, then the industry average cost of debt would reflect only the lower interest rates resulting from the refinanced issues. No LEC would receive recovery of the debt refinancing costs.

11. Finally, BellSouth argues that the formal waiver proceeding that LECs are forced to follow under Part 32 is time consuming and burdensome to the LEC as well as the Commission. BellSouth emphasizes that because of such a lengthy procedure, it may not be able to take advantage of a favorable market condition in order to refinance debt, and ratepayers would not be able to benefit from lower costs which would result from such refinancings.

IV. COMMENTS

12. Interested parties were invited to file comments on BellSouth's petition for reconsideration on or before January 8, 1988, and reply comments on or before January 19, 1988. Comments were received from Central Telephone Company (Centel) and from the investment banking firm of Shearson Lehman Brothers (Shearson Lehman). Reply comments were received from BellSouth.[11]

13. Centel and Shearson Lehman support BellSouth's Petition for Reconsideration. Centel does not address specific issues, but Shearson Lehman states that the routine grant of amortization of debt refinancing costs under Part 31 rules is more in line with regulatory objectives than the formal waiver procedures to be followed for such activity under Part 32. It states that amortization provides a means of neutralizing the effects of refunding on shareholders without giving up direct and indirect benefits to ratepayers. Finally, Shearson Lehman believes that if amortization is allowed, it should be over the remaining life of the old debt issue.[12]

14. In its reply comments, BellSouth notes that all commenting parties favored its request and therefore the Commission should initiate a Rule Making proceeding to adopt Part 31 accounting for carriers seeking permission to amortize debt refinancing costs provided they can demonstrate that ratepayers will benefit from such refinancing.

V. DISCUSSION

15. We are not persuaded by BellSouth and the commenting parties that the Commission should amend Part 32 to permit LECs to request permission to amortize debt reacquisition expenses outside of the waiver process. There are incentives in place to encourage LECs to refinance existing high cost debt without amortization. As a practical matter, the embedded cost of debt currently used in calculating the unitary interstate rate of return for the LECs is an industry-wide average cost.[13] It is always advantageous for each carrier to maintain an embedded cost of debt that is as low as possible because the unitary rate of return considers both debt and equity costs. As debt costs are reduced, proportionately more of the fixed return flows to shareholders. To the degree that a LEC is able to remain below the industry-wide average, it will tend to earn a higher than average return for its shareholders. Conversely, to the degree its cost of debt is above the average, a LEC will tend to earn a lower than average return for shareholders. Thus, any reduction of a company's cost of debt will benefit shareholders.

16. Moreover, determinations of allowable rates of return often lag behind the refinancing transaction, producing benefits which can be offset against a loss recognized in the period the debt is extinguished. Rates of return based on the higher cost debt that has been extinguished remain in effect while the actual interest costs have been reduced. Thus, in addition to any differential between the industry average and a particular LEC's cost of debt, there is a benefit from the regulatory lag.

17. BellSouth believes that we overstate the incentives because if all LECs are denied amortization, no LEC will ever recover refinancing costs for its shareholders. These refinancing costs, however, are recovered as part of a carrier's earned return on investment. Therefore, carriers will have an opportunity to recover these costs as long as the prescribed rate of return is adequate regardless of the manner in which the costs are accounted for. As a practical matter, we believe individual circumstances will play a greater role in influencing the individual actions of LECs than amortization.[14] These individual circumstances include, but are not limited to, the differential between interest rates applicable to old debt and new issues, the maturity dates and call provisions of existing high cost debt, and the cash position of the LEC. It is also noteworthy, that because a unitary rate of return is prescribed for all LECs, an individual LEC has never been assured of recovering its own costs.

18. We disagree with Shearson Lehman's allegation that amortization would be an appropriate way to deal with these costs for the benefit of the ratepayers and shareholders because amortization would match these costs against revenues in future years. Shearson Lehman apparently believes that amortization permits these costs to be recovered in future revenues. In reality, as far as the regulation of interstate rates is concerned, there is no *quid pro quo* connection between these costs and revenues when am-

ortization is permitted. As we have already noted, cost of debt calculations used in interstate rates of return are based on industry averages, and the revenues produced by industry averages may or may not be sufficient to produce revenues to "recover" losses on the extinguishment of debt over the life of a new replacement issue, even when amortization is allowed. In other words, the amortization solution proposed by BellSouth would not resolve Shearson Lehman's perceived "recovery" problem.

19. We also disagree with BellSouth's assertion that a one-time charge affects a nonregulated company differently than a regulated company because the nonregulated company can offset the one-time charge with higher future profits, while the regulated company would have its earnings adjusted in the future to reflect the lower debt costs. We believe BellSouth's assertion incorrectly assumes that profit levels of the nonregulated company will remain high enough to offset the one-time charge. There are no guarantees of continuing profitability levels in the nonregulated business community.

20. The prevailing accounting guidance for dealing with debt refinancing transactions has been established in APB Opinion No. 26. That opinion expressly prohibits the amortization of gains or losses over future periods.[15] In imposing this requirement, the Accounting Principles Board had considered several methods to account for debt reacquisition transactions. In adopting its opinion, the Accounting Principles Board concluded that all extinguishments of debt before scheduled maturities are fundamentally alike and that the accounting for such transactions should be the same regardless of the means used to achieve the extinguishment. The view adopted by the Accounting Principles Board holds that debt is reacquired and refinanced because the market value of the old debt has changed over time to an extent that paying the call premiums[16] on current value is a favorable way to extinguish the debt. These changes in market value occurring over time have not been reflected in the accounts, and as a result, the recorded amount of debt does not reflect the amount it would take to extinguish the debt. Because the changes have taken place in past periods when the old debt contract was in effect, the Accounting Principles Board's view was that the entire difference between the carrying value of the debt and the reacquisition price should be recorded when the specific debt contract is terminated. Moreover, any call premium and unamortized discount or premium is related to the old debt contract and should not be related to the new issue. We believe this view is fundamentally sound, and when debt reacquisitions are viewed in this light, we conclude that the prescribed GAAP accounting produces equitable results.

21. For the foregoing reasons, we conclude that the accounting prescribed under Part 32 is appropriate and fair to shareholders and ratepayers. We therefore deny BellSouth's Petition for Reconsideration.

VI. ORDERING CLAUSE

22. Accordingly, IT IS ORDERED pursuant to Section 405 of the Communications Act of 1934, as amended, 47 USC §405, that BellSouth's Petition for Reconsideration seeking a Rule Making proceeding to amend the Commission's Rules to permit amortization of debt refinancing expenses and unamortized discounts and premiums associated with reacquired debt over the life of the replacement debt issue IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Use of Certain Generally Accepted Accounting Principles in Part 32 of the Commission's Rules, 2 FCC Rcd 6675 (1987) (*The Debt Refinancing Order*).

[2] The Uniform System of Accounts for Telecommunications Companies prescribed in 47 C.F.R. Part 32 replaced the Uniform System of Accounts for Class A and Class B Telephone Companies in 47 C.F.R. Part 31, effective January 1, 1988. (*See* also note 5, *infra*.).

[3] The reacquisition cost is the amount paid for the early extinguishment before maturity, including any call premium and expense of reacquisition.

[4] The net carrying amount of the debt includes the amount payable at maturity adjusted for any unamortized premium or discount related to the debt as well as any unamortized debt issue costs.

[5] Part 31 was effective through December 31, 1987. It was replaced by Part 32, effective January 1, 1988. Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telelphone Companies, 51 F. R. 24745, July 8, 1986; 51 F. R. 43493, December 2, 1986 (*New USOA Order*), *recon. denied in part and granted in part* 2 FCC Rcd 1086 (1987) (*Reconsideration Order*).

[6] The absence of language similar to that contained in Part 31 does not affect the ability of carriers to request waivers pursuant to 0.457 of the Commission's rules.

[7] These GAAP requirements are contained in Accounting Principles Board Opinion No. 26, Early Extinguishment of Debt, which was issued by the Accounting Principles Board in October 1972 (APB Opinion No. 26). The Accounting Principles Board preceded the Financial Accounting Standards Board as the authoritative accounting standard setting body for the American business community. Even though the Accounting Principles Board (APB) was replaced by the Financial Accounting Standards Board in 1973, APB Opinion No. 26 is still the prevailing guidance for accounting for debt extinguishments.

[8] Petition for Waiver of Section 32 .4240 of the Commission's Rules to Permit Amortization of Debt Refinancing Expenses, Unamortized Discounts and Premiums Associated with Reacquired Debt Either Over the Life of the Replacement Issue or Over the Remaining Life of the Called Debt Issue, *Memorandum Opinion and Order*, 4 FCC Rcd 387 (Com. Car. Bur. 1989) (*BellSouth Waiver Order*), *petition for recon. pending.*

[9] BellSouth Petition for Reconsideration Attachment A p. 2.

[10] *Id.* at 3.

[11] Three letters in support of BellSouth's Petition were received after the close of the comment period and placed in the public file. Letters were received from Goldman Sachs & Co. on January 20, 1988, Morgan Stanley & Co. on February 2, 1988,

and Salomon Brothers, Inc. on February 25, 1988. These letters were considered in the development of this Order, but raised no new issues not already covered in BellSouth's petition.

[12] Shearson Lehman Comments at 2.

[13] *See* 47 C.F.R. §§ 65.300 and 65.301.

[14] We note that despite our denial of BellSouth's waiver request in the *BellSouth Waiver Order*, BellSouth did refinance existing debt in the amount of $481 million in 1989.

[15] *See* note 7, *supra*.

[16] Call premiums are a part of a debt contract which requires additional payments to debtholders when debt is recalled by the issuer prior to maturity.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-222

In the Matter of

Amendment of Part 95 of the Rules regarding the technical standards for transmitters operating in the 72-76 MHz band in the Radio Control (R/C) Radio Service.	RM-6683 RM-6746

NOTICE OF PROPOSED RULE MAKING

Adopted: April 18, 1990; Released: April 27, 1990

By the Commission:

I. INTRODUCTION

1. This *Notice of Proposed Rule Making* (*Notice*) proposes to amend the Technical Regulations for the Radio Control (R/C) Radio Service (47 C.F.R. Part 95, Subpart E) to reduce the permitted level of unwanted emissions and to improve the frequency stability of transmitters operating in the 72-76 MHz band that are used for remote control of model aircraft, boats, and cars. This proposal was initiated by petitions for rule making from Glenn H. Whidden (Whidden) (RM-6683) and The Academy of Model Aeronautics, Inc. (AMA) (RM-6746), which represents approximately 140,000 model aircraft enthusiasts.

II. BACKGROUND

2. In 1982, the Commission made eighty channels in the 72-76 MHz band available on a secondary basis for radio remote control of model aircraft, boats, and cars.[1] Because of the current technical standards, however, simultaneous adjacent channel operation is often not possible at the same site. Thus, all of the channels may not be available to model aircraft enthusiasts at a single location. The AMA's petition asks the Commission to rectify this situation by requiring a decrease in the level of unwanted emissions and an increase in the frequency stability of these R/C transmitters.[2] Whidden's petition also seeks to mandate the use of such transmitters but for a different reason. [3] Whidden alleges that because both wideband and narrowband transmitters are being marketed currently, a safety hazard would be present if both types of transmitters were to appear at the same flying site at the same time.[4]

3. The AMA points out that its current utilization plan for the 72-76 MHz band essentially provides for the use of every other channel. The AMA argues that adoption of narrowband standards would allow all the available channels to be used, thus promoting a more efficient use of the radio spectrum as well as a safer, more flexible operational environment for model aircraft enthusiasts.[5] The AMA also notes that most of the new transmitters produced today already comply with the narrowband standards it proposes. In addition, the AMA supports a voluntary narrowbanding program to modify existing wideband transmitters. The AMA contends, however, that the time has come for a mandatory requirement so that no manufacturer can market a transmitter that fails to meet narrowband standards.[6]

4. Whidden's concern is twofold. He believes that model aircraft accidents might occur because of possible interference caused by the use of both wideband and narrowband transmitters.[7] On the other hand, he is sensitive to the fact that model aircraft enthusiasts now have an investment in wideband transmitters that they would not want to abandon and would be reluctant to purchase narrowband transmitters.[8] Whidden requests, therefore, that sale of wideband transmitters be prohibited after December 20, 1990, with a grandfather clause to allow for the use of existing transmitters for an indefinite period.[9]

III. PROPOSAL

5. In our view, the two petitions have merit. By reducing unwanted emissions and tightening the frequency stability of R/C transmitters, the available R/C channels in the 72-76 MHz band can be used more efficiently. Thus, we propose to amend Sections 95.623 and 95.631, 47 C.F.R. §§ 95.623 and 95.631, to improve frequency stability standards and to reduce the permitted level of unwanted emissions emanating from R/C transmitters operating in the 72-76 MHz band. In effect, these changes will reduce the possibility of adjacent channel interference and, thus, will allow all of the available channels to be used. For the sake of consistency, these proposed rules would apply to all of the 72-76 MHz channels -- both for model aircraft and for model boats and cars.

6. We propose to require that effective March 1, 1992, all R/C transmitters designed to operate in the 72-76 MHz band and submitted to the Commission for approval under its equipment authorization program, or manufactured in, or imported into the United States must comply with the standards proposed in this proceeding. Additionally, we propose to bar, effective March 1, 1993, the marketing and sale of R/C transmitters that have not been authorized pursuant to the new standards. Wideband transmitters purchased before March 1, 1993, not meeting the proposed narrowband standards, could continue to be used. This proposed implementation schedule should provide for an orderly transition to a narrowband equipment environment. At the same time, it will not affect current users of wideband equipment. We invite comments on the proposed technical standards and the proposed implementation dates.

IV. INITIAL REGULATORY FLEXIBILITY ANALYSIS

7. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. § 601 *et seq.*, our initial analysis is as follows:

Reason for Action

8. We propose to adopt narrowband technical standards for transmitters operating in the 72-76 MHz band used for the remote control of model aircraft, boats, and cars.

Objective

9. The objective of the proposed rules is to promote a more efficient use of the radio spectrum by utilizing all the channels that are presently available for model operations.

Legal Basis

10. The proposed action is authorized under 47 U.S.C. §§ 154(i), 302, and 303(f) and (r).

Reporting, recordkeeping and other compliance requirements

11. Not applicable.

Federal rules which overlap, duplicate, or conflict with these rules

12. These proposed rules do not overlap, duplicate, or conflict with other Federal rules.

Description, potential impact, and number of small entities involved

13. We have included an Initial Regulatory Flexibility Analysis in this document because we cannot, at this juncture, determine with any specificity the number of manufacturers who would avail themselves of the opportunity to produce and market 72-76 MHz narrowband transmitters for the subject uses. We solicit comments from such manufacturers so that we can gauge the extent of such production and marketing and its effect, if any, on small business entities. We anticipate that the proposed rules would result in some consumer demand for new R/C transmitters and, therefore, would increase the revenues of small business entities engaged in the manufacture and marketing of such transmitters.

Any significant alternatives minimizing the impact on small entities and existing licensees and consistent with the stated objective

14. If spectral efficiency is to be achieved by maximizing channel usage, there are no significant alternatives that warrant consideration.

V. PROCEDURAL MATTERS

15. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. § 3501 *et seq.*, and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements and will not increase or decrease burden hours imposed on the public.

16. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. *See* 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. *See* 47 C.F.R. § 1.1203.

17. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

18. Any person making an oral *ex parte* presentation of data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. *See* 47 C.F.R. § 1.1206.

19. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **August 10, 1990,** and reply comments on or before **September 14, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments and reply comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to the Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D. C. 20554.

20. A copy of this Notice of Proposed Rule Making will be forwarded to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 95 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 95, continues to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U. S. C. §§ 154, 303.

2. Section 95.623 is amended by revising paragraph (b) and adding a new paragraph (c) to read as follows:

§ 95.623 R/C transmitter channel frequencies.

* * * * *

(b) Each R/C transmitter that transmits in the 26-27 MHz frequency band with a mean TP of 2.5 W or less and that is used solely by the operator to turn on and/or off a device at a remote location, other than a device used solely to attract attention, must be maintained within a frequency tolerance of 0.01%. All other R/C transmitters that transmit in the 26-27 MHz frequency band must be maintained within a frequency tolerance of 0.005%. Except as noted in paragraph (c), R/C transmitters capable of operation in the 72-76 MHz band must be maintained within a frequency tolerance of 0.005%.

(c) On or after March 1, 1992, all R/C transmitters capable of operation in the 72-76 MHz band that are either manufactured in or imported into the United States, or are marketed or sold on or after March 1, 1993, must be maintained within a frequency tolerance of 0.002%. R/C transmitters operating in the 72-76 MHz band marketed or sold before March 1, 1993, may continue to operate with a frequency tolerance of 0.005%.

3. In Section 95.631(b), the entry in the table for R/C transmitters is revised, the present Note to the table is designated as Note 1 and Note 2 is added to the table, paragraphs (7) and (8) are amended by adding the number 10 before the word log, and paragraphs (10), (11), and (12) are added before the Note at the end of this section to read as follows:

§ 95.631 Unwanted radiation.

* * * * *

(b) * * *

Transmitter	Emission type TYPE	Applicable paragraphs
* * * * *		
R/C		
27 MHz band	As specified in § 95.627(b)	(1), (3), (7)
72-76 MHz band	As specified in § 95.627(b)	(1), (3), (7), (10), (11), (12)

* * * * *

NOTE 1: Unwanted RF radiation may be stated in mean power or in peak envelope power, provided it is stated in the same parameter as TP.

NOTE 2: Paragraphs (1), (10), (11), and (12) apply to transmitters operating in the 72-76 MHz band manufactured or imported into the United States on or after March 1, 1992, or marketed or sold on or after March 1, 1993.

Paragraphs (1), (3), and (7) apply to transmitters operating in the 72-76 MHz band manufactured or imported into the United States before March 1, 1992, or marketed or sold before March 1, 1993.

R/C transmitters operating in the 72-76 MHz band marketed or sold before March 1, 1993, meeting the emission standards specified in paragraphs (1), (3), and (7), may continue to operate.

* * * * *

(7) At least 43 + 10 log10 (TP) dB on any frequency removed from the center of the authorized bandwidth by more than 250%.

(8) At least 53 + 10 log10 (TP) dB on any frequency removed from the center of the authorized bandwidth by more than 250%.

* * * * *

(10) At least 45 dB on any frequency removed from the center of the authorized bandwidth by more than 100% up to and including 125% of the authorized bandwidth.

(11) At least 55 dB on any frequency removed from the center of the authorized bandwidth by more than 125% up to and including 250% of the authorized bandwidth.

(12) At least 56 + 10 log10 (TP) dB on any frequency removed from the center of the authorized bandwidth by more than 250%.

* * * * *

FOOTNOTES

[1] *See Report and Order*, General Docket 82-181, 47 Fed. Reg. 51875 (1982).

[2] AMA petition at 3.

[3] To simplify this discussion, we will use the term "wideband" to refer to transmitters produced under the current emission and frequency stability standards. We will use the term "narrowband" to refer to transmitters complying with the improved emission and frequency stability standards sought by the petitioners.

[4] Whidden petition at 2.

[5] AMA petition at 3-5.

[6] AMA petition at 6-8.

[7] Whidden petition at 2.

[8] Whidden petition at 3.

[9] Whidden petition at 4.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 90-217

In the Matter of

Establishment of Procedures
to Provide a Preference
to Applicants Proposing an
Allocation for New Services

NOTICE OF PROPOSED RULE MAKING

Adopted: April 12, 1990; Released: April 27, 1990

By the Commission:

1. By this action, the Commission is proposing to adopt rules that would provide preferential treatment in its licensing process for parties requesting spectrum allocation rule changes associated with the development of new communications services. The proposed rules would help to ensure that innovators have an opportunity to participate in new services that they take a lead in developing. This action is in response to a Petition for Rule Making submitted by the Washington Center for Public Policy Research (Washington Center) on July 14, 1989.[1] The Commission believes that the proposed "pioneer's preference" would foster the development of new services that make use of technological advances by reducing for innovators the delays and risks associated with the Commission's allocation and licensing processes.

BACKGROUND

2. In its petition, Washington Center argues that the Commission's spectrum allocation and licensing processes can inhibit the formation of business capital needed to launch new communications services. It submits that when an innovator, especially a small entity, develops an idea for a new service, it cannot simply arrange for developmental funding and try its idea in the market. Rather, it must first request that the Commission allocate spectrum or change some technical standards, thus making the idea public, and then compete with other parties for a license. Washington Center states that during the proceeding to allocate spectrum or change technical standards, others--perhaps larger companies with greater resources--can evaluate the proposed new service and, if the rule making is successful, compete for a license at the same time as the original petitioner. It submits that the governmental process thus undermines the competitive edge that would normally accrue to the innovator and that it is possible that the innovator might not even be able to obtain a license to operate in the new service. Washington Center contends that in view of these barriers, venture capital may not be available to an innovator and its idea would then die, with the result that the public would lose the opportunity for a potentially valuable new service. It states that it has been informed several times in recent years of instances involving this problem where the new idea was never brought forward. As an example of one instance where an innovator of a new service was discouraged, it points to the decision of the Xerox Corporation to withdraw from commercially developing its "X-TEN" Digital Termination System (DTS) service in the 10 GHz band.[2]

3. In order to spur new services when allocation proceedings are required, Washington Center suggests that the Commission amend its rules to permit a party proposing a new service that requires an allocation of spectrum to accompany its petition for rule making with an application, which can be granted when the allocation proceeding is completed and the rules for the new service are adopted. Under this procedure, competing applications would not be accepted, and the licensing of other service providers would be deferred, for a given time. Washington Center also proposes that the Commission expand the role of experimental authorizations to permit restricted commercial operation during the pendency of the rule making and suggests that the Commission consider setting aside 12 MHz of spectrum for open experimentation. [3]

DISCUSSION AND PROPOSAL

4. We believe that a "pioneer's preference" is desirable for parties who endeavor to undertake the effort and risk associated with the development of new services and technologies.[4] As Washington Center describes, our spectrum allocation and licensing processes appear to make it more difficult and expensive for an innovator to bring a new communications service to the market.[5] We are concerned that the adverse effects of these process could have a chilling effect on the development and implementation of new communications services. Innovators of new services must spend a considerable amount of time and money in order to develop these services. The spectrum shortages of today can compound this expense. In presenting their ideas for new services to the Commission's staff, several innovators have recently indicated their hesitancy to dedicate such resources to the development of a new service unless they were assured that they would be able to provide the service and, thus, recoup their investment. Other parties have suggested that they would not be able to obtain from investors the necessary funding for researching and developing a new service unless they could ensure those providing the funding that the risks are reasonable compared to other investments. A preference procedure that would ensure the innovator an opportunity to participate in a service it first sought to develop and would preserve its competitive advantage for a period of time would mitigate the adverse effects of our processes on investment incentive for innovators.

5. We view this preference as providing innovators of new services with the same type of protection for creative products that the United States laws provide to inventors, writers, and artists. Under the constitutionally enabled patent system of the United States, inventors are granted, to the exclusion of all others, the right to produce, use, or sell their invention for a specific period of time as a reward for their endeavors. The copyright laws provide similar protections and rewards for the works of authors and artists. However, no system exists for rewarding those who develop new frequency-based services. In our view, such a system is also warranted in order to encourage

entrepreneurs and venture capitalists to invest time and money in new services and any related technologies, just as inventors and authors are rewarded for their efforts. We believe that the "pioneer's preference" system set forth below would adequately reward those who develop new services.

6. We seek comment and information regarding our initial conclusion that a need exists for a "pioneer's preference." We recognize that it may be difficult to compile a systematic study of such effects, as foregone opportunities generally are not recorded. We encourage interested parties to provide information on any instances where a corporation or individual has decided not to pursue an idea for an innovative service because of the Commission's processes. For example, Washington Center has submitted that the Commission's processes were partially to blame for Xerox Corporation deciding not to proceed with the "X-TEN" service, which it had developed and originally proposed.

7. To implement this "pioneer's preference," we are proposing to adopt rules that would, in many instances, guarantee a party first proposing a new service through a spectrum allocation rule change an opportunity to obtain a license to operate in that service.[6] As suggested by Washington Center, innovators needing an allocation of spectrum in order to provide a new service would be permitted to accompany the petition for rule making with an application setting forth a request for the "pioneer's preference" and indicating where it planned to provide service.[7] In order that the innovator and its potential competitors are fairly apprised of the Commission's intent, we believe that any application requesting a preference should be acted upon as soon as reasonably possible in the allocation proceeding. We intend to set forth our initial determination regarding whether to grant such requests at the time any notice of proposed rule making on the innovator's proposal is issued. In addition, we propose to defer granting any applications from any applicants seeking facilities that are meant to serve the same areas as those proposed in the innovator's application for six months after the grant of any licenses or authorizations to construct to the innovator.[8] We believe that this proposal will substantially lessen the increased risk faced by innovators and their investors that result from the early disclosure of proprietary technology or the delays and uncertainties of our regulatory processes. The guarantee of an opportunity to participate in the new service, coupled with the six month head start over competing applicants, would restore much of the competitive advantage an innovator would otherwise lose through the usual rule making and licensing processes.

8. We propose to award the "pioneer's preference" to any successful petitioner for an allocation for a new service. In order for a service to be considered new, we would require that the proposal be for more than just additional spectrum for services that are already being provided. Moreover, we expect the new service to be more than just a minor variation of an existing service. We intend to limit the "pioneer's preference" to those novel services that address public needs that are being addressed inadequately. Therefore, if a proposal differs significantly from other services being offered and is sufficiently meritorious as to justify an allocation of spectrum, we will consider awarding the preference. We seek comment on this aspect of our proposal. In particular, interested parties are requested to comment on how novelty can be measured and what degree of novelty should be expected.[9] In addition we seek comment on whether we should consider granting multiple preferences, when more than one party submits a petition for rule making to allocate spectrum for the same type of service and the proposed service lends itself to multiple licensees. We also seek comment on the application of the "pioneer's preference" procedure when the new service being authorized will share spectrum already being used by another service(s).

9. In our view, this proposed "pioneer's preference" is consistent with the Supreme Court decision in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945) (*Ashbacker*). Therein, the Court held that the Communications Act requires that all *bona fide*, competing applications are entitled to comparative consideration. However, in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 202-05 (1956), the Court indicated that when adequately supported by the record in a rule making proceeding, the Commission may establish threshold standards that applicants must satisfy before they are entitled to be eligible for comparative consideration. In some instances, such standards may limit eligibility to a class of one.[10] In this case, the class of eligibles would be limited to the innovator(s). Accordingly, and in light of the public interest factors set forth above, we tentatively find that our proposal would be lawful and request comment on that tentative finding.

10. Interested parties are also asked to address the issue of how the proposed preference would affect competition, both domestically and internationally. For instance, we seek comment on whether the preference may be more of an advantage to large companies, which may have greater financial resources, to small companies, which may be under less pressure to demonstrate short-term profits, or possibly to foreign companies, which operate in different regulatory environments. Specifically, interested parties are encouraged to comment on the likely impact our proposal may have on future competition between the providers of the new service and on whether our proposal, to the extent it defers competition, may have a significant adverse effect on the public interest.

11. In instances where the service would warrant only a single licensee in an area or nationwide, we are inclined to grant the preference only to the first party filing a petition for rule making.[11] In the alternative, when several "pioneers" independently develop a new service, we could simply decline to award the "pioneer's preference," if there are more innovators than there are opportunities for service providers. We seek comment on how to deal with overlapping proposals. In addition, we seek comment on whether a preference should be awarded if the Commission's final decision in the rule making is substantially different from the innovator's original proposal. For example, the Commission may determine that the best frequency band for a service is at 2 GHz, rather than at 800 MHz as proposed by the innovator. Similarly, the Commission may allocate less spectrum than the innovator contends is necessary to provide the service or may modify the service proposal on its own motion or as a result of comments filed by other parties. Comments are sought with regard to these general considerations.

12. As an alternative to our proposal to guarantee the innovator an opportunity to be one of the licensed service providers, we also seek comment on whether it might be more appropriate to give a "pioneer" some sort of com-

parative preference in a lottery or hearing.[12] In the latter case, this preference could then be balanced against other criteria that are normally considered when applicants are considered comparatively, such as technical qualifications. Parties supporting this approach should also address whether, and under what circumstances, other criteria might be able to outweigh the "pioneer's preference." For instance, should another applicant be able to succeed against an innovator, if the other applicant can demonstrate that it has greater financial resources and technical qualifications and that it will provide service to the public more rapidly and efficiently? We intend to consider other alternative means of implementing the "pioneer's preference," and we request that interested parties submit alternative proposals or modifications to our proposal.

13. Finally, we seek comments regarding what rules, if any, should apply when entities that have received a "pioneer's preference" may seek to transfer their permits or licenses. Usually considered essential to the innovation process, as well as the commercial development of the fruits of innovation, is the relative freedom to sell an innovation. The ability to capitalize on innovation and the ability to innovate, moreover, are not necessarily the same. Needless limits on transferability, therefore, have potential both to chill the innovation process and to retard the commercial deployment of new and innovative ideas. By the same token, there may be a need for Commission rules and policies, or both, which seek to minimize any speculation in preferences. Again, it is not clear what, if any, measures, might be appropriate. Nevertheless, transferability issues present important policy choices, and we urge commenters to provide their views on these issues.

14. We are declining to consider Washington Center's proposals for expanding the role of experimental authorizations and setting aside discrete spectrum for experimentation. We find that the current experimental authorizations process adequately encourages the introduction and development of new technologies.[13] Our current experimental licensing process is very accommodating for those with new services and technologies. Further, in light of the significant spectrum shortages that now prevail, it is not reasonable to set aside a discrete block(s) of spectrum for experiments. Moreover, the spectrum requirements of new services will vary depending upon the technology being used and the service being proposed. Thus, it would not be feasible to set aside sufficient spectrum to accommodate the varying spectrum demands that may arise from future services and technologies. Additionally, we do not believe, as Washington Center suggests, that precluding all but the innovator from experimenting with the new service necessarily serves the public interest. These other experiments may modify the innovator's proposed service such that while it fails, another similar experimental service succeeds and the public benefits.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

15. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. section 603, the Commission finds as follows:

I. Reason for Action

This action is being initiated in order to promote the introduction of new telecommunications services. We believe that if they are adequately rewarded for their efforts, innovators would be better motivated to develop new services. The "pioneer's preference" proposed in this Notice of Proposed Rule Making is expected to mitigate the increased risk that telecommunications innovators face as a result of the delays and uncertainties of our regulatory processes.

II. Objective

The objective of this proposal is to encourage innovators, including individuals, small businesses, and large corporations, to develop new technologies.

III. Legal Basis

The proposed action is authorized under sections 4(i), 7(a), 303(c), (g), and (r), and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. sections 154(i), 157(a), 303(c),(g), and (r), and 309(a). These sections authorize the Commission to make such rules and regulations as may be necessary to encourage more effective use of radio and new technologies in the public interest.

IV. Description, Potential Impact, and Number of Small Entities Affected

The proposed action would guarantee innovators an opportunity to participate in new services in which they are a pioneer and provide them with six months head start over other parties desiring to provide the new service. Generally, we believe that this action will spur individuals and small businesses to become more involved in the field of telecommunications, as it will help ensure that they are more adequately rewarded for their endeavors. We are, however, unable to specifically quantify this result. We invite interested parties to comment on this point.

V. Reporting, Record Keeping and other Compliance Requirements

Parties seeking a "pioneer's preference" would be required to submit a written request for the preference and an application for license. The request for the preference should not require more than a couple of hours to prepare. The burden on those preparing the application for the applicant will vary depending upon the complexity of the proposed service. We do not intend to require any more information for these applicants than we do from applicants in our other services.

VI. Federal Rules which Overlap, Duplicate, or Conflict with this rule

None.

VII. Significant Alternatives

As noted in paragraph 12 above, one significant alternative would be to provide innovators with preferences, either dispositive or weighted, in comparative hearings or lotteries. Interested parties may raise any other alternatives that they believe might warrant consideration.

16. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new or modified information collection on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

17. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

18. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. Section 1.1206.

19. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary and must be labeled or captioned as an *ex parte* presentation. Section 1.1206.

20. This action is taken pursuant to sections 4(i), 7(a), 303(c), (g), and (r), and 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. sections 154(i), 157(a), 303(c), (g), and (r), and 309(a).

21. The Application for Review of Washington Center for Public Policy Research is hereby GRANTED IN PART to the extent indicated herein and otherwise DENIED.

22. Pursuant to applicable procedures set forth in sections 1.415 and 1.419 of the Commission's rules, interested parties may file comments on or before **June 29, 1990,** and reply comments on or before **July 30, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

23. For further information concerning this rule making contact Mr. Rodney Small at (202) 653-8116 or Mr. Joseph McBride at (202) 653-8108, Office of Engineering and Technology, Federal Communications Commission, Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX -- PROPOSED RULE AMENDMENT

1. Part 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

PART 1 - PRACTICE AND PROCEDURE

2. The authority citation in Part 1 continues to read:

AUTHORITY: Sec. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303; Implement, 5 U.S.C. 552, unless otherwise noted.

3. New section 1.402 is proposed to be added to read as follows:

Section 1.402 Pioneer's Preference.

(a) When filing a petition for rule making, pursuant to section 1.401, that seeks an allocation of spectrum for a new service developed by the petitioner, the petitioner may also submit a separate request that it be awarded a pioneer's preference in the licensing process for the service. The petitioner must accompany its request for the preference with an application that contains pertinent information concerning its qualifications to be a licensee, its financial condition, and its plan for implementing the service. Petitioner must also submit any additional information that the Commission may re-

quest. At the latest, the Commission will respond to this request at the conclusion of the allocation proceeding, although it may respond to the request for a pioneer's preference at any time prior to the conclusion of the proceeding.

(b) If awarded, the pioneer's preference will provide that the petitioner's application will not be subject to competing applications. In addition, the Commission may provide that applications from competing service providers will be held in abeyance for six months. The Commission will determine the extent of the pioneer's preference on a case-by-case basis after considering all relevant circumstances.

(c) Parties to the rule making proceeding may file comments on the request for a pioneer's preference in accordance with section 1.405 of the rules. If a request for a pioneer's preference is made, the rule making proceeding will be considered a restricted proceeding in accordance with section 1.1208 of the Commission's rules from the time that the Notice of Proposed Rule Making is released.

(d) In the event of a conflict between the pioneer's preference rule and any rule for a particular service that provides for the filing and consideration of competing applications, this rule shall prevail.

FOOTNOTES

[1] In taking this action, the Commission also grants, in part, an Application for Review filed by Henry Geller and Donna Lampert, who are Washington Center associates, of the Chief Engineer's earlier dismissal of Washington Center's petition in a letter dated August 9, 1989. Washington Center initially filed its petition in December 1986 and then submitted a second petition on this same subject in July 1989. The second petition essentially reiterated the original request.

[2] For a history of the DTS/Digital Electronic Message Service proceeding, *see* Petition for Rule Making, RM-3247, submitted November 16, 1978, by the Xerox Corporation; *Notice of Proposed Rule Making and Inquiry*, GEN Docket No. 79-188, 44 FR 51,257 (1979); *First Report and Order*, GEN Docket No. 79-188, 49 RR 2d 509 (1981); *Further Notice of Proposed Rule Making*, GEN Docket No. 79-188, 46 FR 45,632 (1981); *Memorandum Opinion and Order*, GEN Docket No. 79-188, 90 FCC 2d 319 (1982); *Second Report and Order*, GEN Docket No. 79-188, 54 RR 2d 1091 (1983); *Memorandum Opinion and Order*, GEN Docket Nos. 79-188 and 82-334, 56 RR 2d 1171 (1984); and *Memorandum Opinion and Order*, GEN Docket Nos. 79-188 and 82-334, 58 RR 2d 291 (1985).

[3] In accordance with 47 CFR sections 1.403 and 1.405, the Commission usually places petitions for rule making, such as the Washington Center's petition, on public notice and requests comment thereon before commencing a rule making proceeding. Because Washington Center's petition has been pending since last July and we are convinced that it has some merit, we are hereby waiving sections 1.403 and 1.405 of our rules. Interested parties will not be disadvantaged by this action, as they will have ample opportunity to make their views known in the rule making proceeding.

[4] In many instances, new technologies, such as those used in new equipment for existing services and in Industrial, Scientific, and Medical equipment pursuant to Part 18 of the Commission's rules, do not require Commission action in order to be implemented. In GEN Docket No. 85-171, the Commission addressed the issue of decreasing barriers for new technology in existing services. *See Notice of Inquiry and Proposed Rule Making*, GEN Docket No. 85-171, 50 FR 25,274 (1985); *Further Notice of Proposed Rule Making*, 3 FCC Rcd 1655 (1988). However, in those instances where the new technology is to be utilized in conjunction with a new service, an allocation will usually be necessary. In this proceeding, any discussion of new technologies refers to the latter situation.

[5] While some new services have been developed and implemented over the last few years, our concern herein addresses primarily the adverse effects our processes may have on parties less willing or able to accept the costs associated with the increased risk that results from these processes.

[6] The innovator would, of course, be required to meet all of the eligibility requirements that would be established for the new service. If the service were nationwide, the innovator would obtain only a single license. However, if applicants were required to apply for the service on a regional basis, as was the case with the cellular radio service, then the pioneer could use its preference to obtain one of the licenses in each region that it wished to operate in. We seek comment as to what limits should be placed on the amount of spectrum and service area a pioneer could claim.

[7] As some services are licensed by city or market, we seek comment on whether applicants for the "pioneer's preference" should be subject to a limit on how may licensees they can request. For instance, if a service with only two licensees per market, as is the case with cellular, were to develop, an innovator should not require licenses in all markets in order to recover its research and development costs.

[8] Deferring competing applications for any longer a period of time or precluding the filing of applications for areas outside those areas requested by the innovator in its application does not appear to be in the public interest. The former would possibly permit the innovator to establish a monopoly and, thus, deny the public the benefits of competition unnecessarily. Nevertheless, because six months may be insufficient, in some instances, for an innovator to establish its service and recoup some of its costs, we seek comment on whether a greater period of time would be appropriate and, particularly, whether time periods should be handled on a case-by-case basis. As for the latter concern, we believe that precluding the filing of applications in areas that the innovator has not sought authority to serve would unnecessarily delay service to the public.

[9] In light of the rationale underlying Washington Center's proposal, it could be argued that the "pioneer's preference" should be available only when the new service uses a new technology. Any commenters advancing this alternative should address what constitutes a new technology. Conversely, it could also be argued that even requiring a "new service" implies too great a degree of novelty. Comments are sought on these considerations.

[10] *See, e.g., Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989); *Second Report and Order*, GEN Docket No. 82-243, 4 FCC Rcd 2012 (1989); *see also Notice of Proposed Rule Making*, PR Docket No. 89-553, 4 FCC Rcd 8673, 8680 (1989); *Notice of Proposed Rule Making*, PR Docket No. 88-191, 3 FCC Rcd 3532, 3536 (1988).

[11] In the mobile satellite service, several entities filed applications to operate the service, but we ultimately determined that a consortium of all qualified applicants should be licensed to provide the service. *See Second Report and Order*, GEN Docket No. 84-1234, 2 FCC Rcd 485 (1987).

[12] We note that under our lottery statute our ability to provide preferences is limited. Therefore, we may need to ask Congress to amend section 309(i) of the Communications Act before a "pioneer's preference" could be used in a lottery.

[13] *See generally Report and Order*, GEN Docket No. 82-469, 54 RR 2d 1363 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PROGRESSIVE CELLULAR III B-2 File No. 10008-CL-P-317-A-88

For construction authority to establish a new cellular system to operate on frequency block A in the Domestic Public Cellular Radio Telecommunications Service to serve Market No. 317, Alaska 3--Haines Rural Service Area

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1990; Released: April 26, 1990

By the Commission:

1. Progressive Cellular III B-2 (Progressive) won the non-wireline lottery for the Alaska 3--Haines Rural Service Area (RSA). Subsequently, the Mobile Services Division (MSD) dismissed Progressive's application as unacceptable for filing because it did not have a firm financial commitment as required by Section 22.917(c)(1) of the Commission's Rules. The Common Carrier Bureau affirmed the dismissal of Progressive's application in *Progressive Cellular III B - 2* (*Bureau Order*), 4 FCC Rcd 5254 (Com. Car. Bur. 1989). On July 28, 1989, Progressive filed an application for review of the *Bureau Order*, in which it seeks reinstatement of the above-captioned application.

I. BACKGROUND

2. In its initial application filed on July 15, 1988, Progressive relied upon a financial commitment letter from Brad Peery, Inc. (Peery) to meet its construction and first-year operating costs. The letter from Peery is dated July 6, 1988, and describes Peery as "an investment banking firm specializing in the telecommunications industry." The first paragraph of the letter states that Peery will fund Progressive's cellular enterprise up to $2,000,000 over a period of up to five years, "subject to the terms set forth herein . . . ." The second paragraph of the letter lists the relevant terms. The relevant terms are that Progressive, which was at that time a general partnership, must: (1) incorporate itself in such a way that it will have 100 per cent voting control of the company which will own and operate the RSA system; and (2) obtain equipment vendor financing up to $1,500,000. Progressive estimated that its construction and first-year operating costs would total $1,053,000.

3. In the October 25, 1988 letter which dismissed Progressive's application, the MSD noted that Progressive was a partnership and the financial commitment letter was contingent upon Progressive forming a corporation.[1] Progressive filed a petition for reconsideration of the MSD's dismissal of Progressive's application. Progressive also filed an amendment to its application, by which it claimed to "update" the Peery letter as well as its budgetary estimates. The amendment included a financial commitment letter from Motorola, Inc. dated October 14, 1988, by which Motorola promised to provide up to $1,137,500 for Progressive's construction and first-year operating costs, which Progressive now estimates to be $1,114,000. The amendment also included a letter from Peery dated October 14, 1988, in which Peery stated that all the terms of its initial financial commitment letter to Progressive had been satisfied or had been unconditionally waived in light of the provision of vendor financing by Motorola sufficient to cover Progressive's construction and first-year operating costs.

4. The *Bureau Order* concluded that Progressive had failed to file a firm financial commitment with its initial application as required by Section 22.917(c)(1) of the Commission's Rules. The *Bureau Order* recognized that the Peery letter did not, by its terms, require Progressive to incorporate itself before the Commission awarded it construction authority. Nevertheless, the *Bureau Order* observed that Progressive's initial application did not even contain a commitment from Progressive that it would meet Peery's incorporation condition. Moreover, the *Bureau Order* found, Progressive's initial application did not contain a letter evidencing the availability of financing from an equipment vendor. The *Bureau Order* therefore concluded that Progressive clearly failed to meet Peery's second term, namely, that it obtain $1,500,000 in vendor financing. Citing *Amendment of the Commission's Rules for Rural Cellular Service, Fourth Report and Order*, 4 FCC Rcd 2542, 2545 at paragraph 16 (1988), the *Bureau Order* emphasized that if a non-wireline cellular applicant for an RSA did not include a firm financial commitment with its initial application, it would be dismissed. The *Bureau Order* observed that the Motorola letter dated October 14, 1988, which Progressive filed with its October 27, 1988 amendment, did not correct a minor discrepancy in Progressive's application; rather, it replaced Progressive's previous financial commitment letter from Peery with a new commitment from Motorola. Thus, the *Bureau Order* concluded, the Motorola letter could not be used to demonstrate that Progressive had a firm financial commitment at the time it filed its initial application. In light of the foregoing facts, the *Bureau Order* found that Progressive's initial application did not contain a firm financial commitment, as required by Section 22.917(c) of our Rules, and affirmed the MSD's dismissal of Progressive's application.

II. PROGRESSIVE'S CONTENTIONS

5. In its application for review of the *Bureau Order*, Progressive argues that Peery's funding obligation to Progressive was an unconditional and absolute commitment, subject solely to Progressive receiving one or more RSA construction authorizations. Progressive argues that the provision in the Peery commitment letter relating to vendor financing was not a condition to Peery's funding obligation, but merely an expression of an alternative source to which Progressive could look for financing. Progressive asserts that Peery had determined that Progressive was eligible for vendor financing, but had always assumed that vendor financing was merely an alternative means of financing Progressive's proposal apart from

Peery's separate commitment to finance that proposal. Alternatively, Progressive argues that if vendor financing is deemed a condition to Peery's financial commitment, then such a condition is "merely perfunctory" given Peery's prior determination of Progressive's eligibility for vendor financing, which eligibility was, in fact, validated by Motorola's subsequent issuance of a financing commitment. Progressive also argues that if the commitment letter's reference to Progressive's incorporation were deemed to be a condition to Peery's funding obligation, such a condition only required Progressive to incorporate itself prior to receiving actual funds, not prior to receiving a construction permit. Thus, Progressive contends that Progressive's incorporation after receiving its construction authorization would not run afoul of the Commission's Rules.

III. DISCUSSION

6. Section 22.917(c)(1) of the Rules states in pertinent part:

> A non-wireline applicant for a new station shall demonstrate, at the time it files its application, that it has either a firm financial commitment or available financial resources necessary to construct and operate for one year its proposed cellular system.

In an effort to deter speculative applicants from filing applications, our *Fourth Report and Order*, *supra*, specifically tightened the requirements relating to a non-wireline applicant's demonstration of its financial qualifications. 4 FCC Rcd 2542 at 2545. One new requirement is that a non-wireline applicant must include a firm financial commitment from a potential lender in its initial application. The *Fourth Report and Order* stated:

> The financial showing must be included in the application. If an application that is selected first in the lottery does not include a firm financial commitment, it will be dismissed.

4 FCC Rcd at 2545. Thus, the Commission has made it clear that an RSA application is unacceptable for filing if it does not include a firm financial commitment. Being unacceptable for filing, an application may not be amended after the filing date or after the lottery, to bring it into compliance with the rules. *See REM Communication*, 3 FCC Rcd 3705 (1988). Accordingly, Progressive's amendment will not be accepted. To the extent that the amendment sheds light on the plain meaning of the commitment letter, however, we will take cognizance of the amendment.

7. After having reviewed the original Peery letter, the *Bureau Order*, and the arguments advanced by Progressive, we conclude that, at the time it filed its application, Progressive did not demonstrate that it had a firm financial commitment for funds upon which it could rely to construct and operate its proposed cellular system for one year, as required by Section 22.917(c) of the Rules.[2] The first paragraph of the Peery commitment letter included in Progressive's original application states in pertinent part:

> This letter will confirm, subject to the terms set forth herein, the commitment of Brad Peery Inc....to fund up to two million dollars ($2,000,000), over a period of up to 5 years, for the purpose of constructing and operating a new cellular radio telecommunications system in one or more Rural Service Areas (RSA's) . . ..

The second term of the Peery letter states:

> Vendor financing will be used to provide up to one million five hundred thousand dollars ($1,500,000). The vendor financing interest rate will be the Chase Manhattan prime rate plus 3%. The term of the Financing will be seven years with interest only during the first three years. For the remaining four years of the loan, interest and principal reduction, based on a seven year amortization schedule, will be payable. At the end of the seven years a balloon payment equal to the remaining unpaid principal balance will be due and payable. The security requirements will consist of the construction permit and license, all equipment and buildings relating to the radio telecommunications system and operations, as well as company name, clients, and any other related property, tangible or intangible.

8. From the face of the Peery letter, Progressive was required to obtain vendor financing as a condition precedent to Peery's commitment to provide any funds to Progressive. This conclusion is reinforced by the Peery letter submitted by Progressive with its amendment in which Peery states that, in light of the commitment obtained from Motorola, the provision as to vendor financing has been fully met. Progressive underscored the conclusion that vendor financing was a condition precedent to Peery's commitment to provide funds by noting that its amendment "evidences its full compliance with the second term" of the Peery Commitment Letter. [3]

9. It is application for review, Progressive now argues that Peery's funding obligation to Progressive was an unconditioned commitment and that the vendor financing language in the Peery letter was merely an expression of an alternative source of financing. In support, Progressive submitted a declaration under penalty of perjury of Bradford L. Peery, the Chairman of Peery, in which he states this interpretation of the vendor financing term and claims that the original commitment letter provided a firm financial commitment to Progressive. We believe that Progressive's explanation of the vendor financing provision, as supported by Mr. Peery's declaration, cannot be reconciled with the plain meaning of the July 6, 1988 Perry letter which was included in Progressive's original application. The notion that the vendor financing provision was an expression of an alternate source of financing is simply unavailing when read in conjunction with the original letter dated July 6, 1988, which establishes such financing as a "term" to which the commitment is subject and the amendment which evidences that the "term" has been met.

10. We also reject Progressive's argument that, if the vendor financing term is deemed to be a condition to Peery's financial commitment, such condition was "merely perfunctory." In support of its argument, Progressive cites *Lynn Juanes*, 2 FCC Rcd 4371 (Mob. Serv. Div. 1987) and *Portland Cellular Partnership* (*Portland*), 2

FCC Rcd 5586, 5588 (Mob. Serv. Div. 1987), *aff'd on other grounds*, 4 FCC Rcd 2050 (1989), *reversed sub nom. Northeast Cellular Telephone Company, L. P. v FCC*, No.89-1206 (D.C. Cir. March 9, 1990). In *Lynn Juanes*, Ms. Juanes had a firm financial commitment from NewVector Communications, Inc. (NewVector) which was based upon Ms. Juanes' promise to purchase equipment from NewVector. The contingency was that Ms. Juanes must negotiate and execute a contract with NewVector to purchase a turnkey system prior to the release of funds for construction of the cellular system in question. This contingency involved standard language included in commitment letters. The applicant already had a financial commitment; the contingency involved matters to be performed by the applicant and its potential lender prior to actually taking down the loans. In contrast to that case, Progressive had to obtain vendor financing from a third party before it could claim to have a financial commitment from Perry. Because Progressive did not obtain such financing prior to filing its application, and did not include in its application evidence of that financing,[4] its application was unacceptable for filing and was properly dismissed. Progressive's reliance on the MSD's decision in *Portland* is also misplaced. As in *Lynn Juanes*, the Commission, in affirming the MSD's grant of Portland Cellular Partnership's application, stated in a footnote that two of the conditions upon which Portland Cellular Partnership's loan were contingent (compliance with "reasonable and ordinary credit criteria" and submission of a "formal commitment" request) were standard requirements to be fulfilled after the grant of the permit and therefore did not render the commitment "not firm." *Portland Cellular Partnership*, 4 FCC Rcd at 2057 n.3.[5] In conclusion, we determine that Progressive has provided no basis upon which to disturb the *Bureau Order*.

11. Accordingly, IT IS ORDERED that the application for review filed by Progressive Cellular III B-2 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The MSD letter also observed that Progressive's application might be defective for other reasons, but in an effort to best utilize the MSD's limited resources, once an application has been found unacceptable for filing for any reason, the processing of that application ceases.

[2] Given our disposition of Progressive's application for review as set forth below, we need not address the arguments advanced by Progressive with respect to the incorporation condition.

[3] *See* Amendment at p.1.

[4] Progressive's initial application did not contain any evidence that vendor financing had been obtained at the time its application was filed. There is, in fact, no dispute that such financing was not obtained until after Progressive's application had been on file for several months.

[5] However, the Commission did not rely on this reasoning in affirming the MSD grant.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

GENERAL	File Nos. 1269-DSE-P/L-89
COMMUNICATIONS,	1270-DSE-P/L-89
INC.	1271-DSE-P/L-89

For Authority to Construct and
Operate a Network of Small Antenna
Earth Stations in the Domestic
Fixed-Satellite Service

ORDER

Adopted: April 4, 1990; Released: April 26, 1990

By the Chief, Domestic Facilities Division:

1. General Communications, Inc. (GCI) has applied to construct and operate a private very small aperture terminal (VSAT) network of fixed earth stations with sixty 1.8 meter, eighty-five 2.4 meter and thirty-five 3.5 meter earth station antennas operating in the 12/14 GHz frequency bands pursuant to the blanket authorization guidelines of the *VSAT Order*.[1] Although it does not oppose the GCI applications, Alascom, Inc. (Alascom) filed comments regarding GCI's applications. No other comments or petitions were received. For the reasons discussed below, we hereby grant GCI's applications.

2. Alascom raises three issues regarding GCI's applications. First, Alascom requests that we condition any authorizations issued to GCI to prohibit GCI from providing facilities-based services in the Alaska Bush.[2] Alascom asserts that grant of the instant applications might undermine the Commission's Alaska Bush proceeding [3] prohibiting duplication of facilities in the Alaska Bush. Second, Alascom asserts that GCI failed to provide a sufficient description of its network control operations. According to Alascom, GCI should supply a more complete description of its planned operations and control so that the Commission can determine whether GCI's VSAT system will result in duplicative facilities in the Alaska Bush, thus violating the requirements embodied in the Alaska Bush proceeding. Finally, claiming that GCI's primary communications business is as a facilities-based Alaskan common carrier, Alascom requests that GCI be required to provide some factual basis for differentiating between the services that it provides as a common carrier and those it intends to provide as a "private carrier."

3. First, no special conditions will be placed on GCI's licenses. Commission policy on the licensing of competing message telecommunications service (MTS) earth stations in Alaska bush communities was set forth in the Alaska Bush proceeding. In that proceeding, the Commission found the competing Bush earth station applications of various Alaska-based carriers to be mutually exclusive because one MTS facility per Bush village could provide all the services proposed by either party. The Commission determined that there were no public interest benefits to be gained in authorizing the construction of duplicative MTS facilities in the Bush. GCI proposes to provide voice, data and video teleconferencing over a private VSAT network. GCI describes its services as non-MTS. Because GCI specifically states it will not be providing MTS, and because no other VSAT network licenses have been specially conditioned, there is no reason to condition GCI's license. Further, GCI's location of its VSAT network is not relevant to the decision here. VSAT networks are comprised of large numbers of technically identical small earth stations that communicate among themselves, operating at unspecified U.S. locations in the 12/14 GHz frequency bands. Every VSAT network licensee is free to locate individual earth stations anywhere in the continental U.S., Alaska or any other U.S. location. The policies and procedures set forth in the Alaska Bush proceeding apply to GCI as well as all other VSAT network licensees operating networks in those U.S. locations. The same regulatory mechanism used to prevent other VSAT licensees from operating duplicative MTS facilities in the Bush will be used to prevent GCI from operating duplicative MTS facilities in the Bush. Therefore, GCI may provide its voice, data and teleconferencing services from its VSAT network. It is not it necessary to add a special condition to GCI's licenses.

4. With regard to the technical and legal completeness of GCI's application, GCI filed an amendment supplementing its application subsequent to its initial filing. In the amendment, GCI described its network as being monitored and controlled through a VSAT earth station at its network control center located in Anchorage, Alaska. GCI's application has been processed in accordance with the same policies and procedures as any other VSAT network application. GCI has described its VSAT network and its proposed operation sufficiently to allow us to grant its application. Of course, GCI will be subject to all the restrictions and conditions set forth in the *VSAT Order*.

5. Finally, there is no reason to believe GCI will operate in any other capacity than as a private carrier as it has described its services in its application. Absent evidence to the contrary, we have no reason to believe that GCI will operate its VSAT network as a common carrier, and thus there is no reason for GCI to differentiate between the services it provides, as Alascom suggests.

6. Accordingly, pursuant to Section 0.291 of the Commission's Rules on delegation of authority, 47 C.F.R. § 0.291, IT IS ORDERED that Application File Nos. 1269/1270/1271-DSE-P/L-89 ARE GRANTED and General Communications, Inc. IS AUTHORIZED to construct and operate a network of fixed earth stations with up to sixty 1.8 meter, eighty-five 2.4 meter and thirty-five 3.5 meter earth station antennas in accordance with the technical parameters and formal conditions specified in the instruments of authorization. The licensee shall annually notify the Commission of the number of each type of station actually constructed and placed into operation within the year.

7. IT IS FURTHER ORDERED that all of the earth stations in this network must operate within the baseline parameters, policies and procedures established in the Declaratory Order in the Matter of Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, 51, Fed. Reg. 15067 (Common Carrier Bureau, April 22, 1986) (*VSAT*

Order). The licensee bears the risk that future changes in satellite location or transponder assignment will require adjustments of the carrier frequencies and system operating parameters in order to avoid adjacent satellite interference.

8. IT IS FURTHER ORDERED that the effective date of this authorization is the adopted date. General Communications, Inc. is afforded thirty days from the date of the release of this order to decline the authorization as conditioned. Failure to respond within that period will constitute formal acceptance of the authorization as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Declaratory Order in the Matter of Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, 51, Fed. Reg. 15067 (Common Carrier Bureau, April 22, 1986) (*VSAT Order).*

[2] "Alaska Bush" communities refer to small, rural Alaskan villages that are isolated from larger cities.

[3] CC Docket No. 80-584, *see* Earth Stations re: Tentative Decision to Establish Joint Owership, 92 FCC 2d 736 (1982) (Tentative *Decision)*; Earth Stations re: Final Decision to Establish Joint Ownership, 96 FCC 2d 522 (1984) *(Final Decision).*

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies — Transmittal No. 354

Revisions to
Tariff F.C.C. No. 1

ORDER

Adopted: April 13, 1990; Released: April 16, 1990

By the Chief, Common Carrier Bureau:

1. Bell Atlantic has filed a mid-course correction, Transmittal No. 354, in which it proposes to increase rates to retarget its earnings in switched access and common line (CL) categories. American Telephone and Telegraph Company (AT&T), MCI Telecommunications Corporation (MCI), and the Public Service Commission of the District of Columbia (DCPSC) have filed petitions to reject, or to suspend and investigate, Bell Atlantic's proposed tariff revisions. Bell Atlantic has submitted a reply. The tariff is scheduled to take effect on April 14, 1990.

2. The DCPSC protests Bell Atlantic's use of averaged revenue requirements, and states that Section 69.104 of the Rules, 47 C.F.R. § 69.104, requires Bell Atlantic to prepare separate revenue requirements and rates for each study area it serves. DCPSC Petition at 1-2. DCPSC states that its costs are lower than other study areas in Bell Atlantic's territory, and that Bell Atlantic's proposed Subscriber Line Charge (SLC) rate increase for the District of Columbia cannot be justified. *Id.* at 2-4.

3. AT&T argues that Bell Atlantic's tariff support is seriously flawed because of two computational errors in its projection of common line revenue requirements. According to AT&T, Bell Atlantic improperly calculated its long term and transitional support payments to the National Exchange Carrier Association. Moreover, says AT&T, Bell Atlantic's common line rate is improper because it relies on an erroneous projection of surchargeable special access lines. Correction of these errors, says AT&T, eliminates the need for the carrier common line rate increase proposed by Bell Atlantic. AT&T Petition at 3-5. AT&T further argues that there are deficiencies in Bell Atlantic's projected earnings forecast. Also, says AT&T, serious questions are raised by variances between the earnings trend reflected by Form 492 data for April through November 1989 and the data for October and November shown in Bell Atlantic's filing. According to AT&T, the October and November data are likely to be more representative of current and future conditions than the Form 492 filings. *Id.* at 7-10.

4. MCI argues that Bell Atlantic has failed to provide sufficient cost support to justify a rate increase, and that the data it does provide cast doubt that an access increase is truly needed. MCI Petition at 3-7. Also, MCI complains that Bell Atlantic's methodology used to calculate its proposed cost adjustment factors is flawed because it fails to account for changes to its 1990 revenue requirements. According to MCI, this methodology overstates 1990 revenue requirements by failing to include the effects of separations changes. *Id.* at 7-8.

5. Bell Atlantic replies that all three petitioners would have Bell Atlantic provide more data than is required for a mid-course correction. Bell Atlantic Reply at 1-2. In response to the DCPSC petition, Bell Atlantic asserts that it correctly computed the total dollar amount of the rate adjustment needed for the CL category, allocated this amount between base factor portion (BFP) and CL-Other, and then allocated the BFP among the seven jurisdictions (including the District of Columbia) based *Id.* at 18-20.

6. In response to AT&T, Bell Atlantic replies that its treatment of support payments in Transmittal 354 is in accord with the Commission's Tariff Update Filing procedure and cannot lead to any over-recovery of revenue requirement. *Id.* at 4-6. Bell Atlantic also disputes AT&T's suggestion that it should have corrected its faulty data on surchargeable special access lines, stating that it would do so in its April 2 filing. *Id.* at 6-7. Subsequently, Bell Atlantic filed revisions to Transmittal No. 354 correcting this error.[1] Further, Bell Atlantic states that the alleged discrepancies between its Automated Reporting Management and Information System data and its Form 492 report data are largely the product of AT&T errors and miscalculations. *Id.* at 10-11. Finally, Bell Atlantic disputes AT&T's reliance on October and November data, arguing that two months is an inadequate data period, and that AT&T's methodologies to deduce two months' data from Bell Atlantic's eight-month showing are flawed. *Id.* at 12-13.

7. In response to MCI's petition, Bell Atlantic disputes MCI's assertion that Bell Atlantic's work stoppage must have decreased costs for the second quarter, stating that overtime, travel expense, and other costs offset the salary hiatus. *Id.* at 15. Bell Atlantic also refutes MCI's assertion that Bell Atlantic has failed to include separations changes, and explains its methodology. *Id.* at 17.

8. The Common Carrier Bureau has reviewed Transmittal 354, the description and justification supporting it, and the pleadings. We conclude that no compelling argument has been presented that the proposed tariff revisions filed by Bell Atlantic are patently unlawful so as to require rejection or that an investigation is warranted at this time.

9. Accordingly, IT IS ORDERED that the petitions of the District of Columbia Public Service Commission, American Telephone and Telegraph Company, and MCI Telecommunications Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] *See* Letter, dated April 13, 1990, from Chief, Tariff Division to Vice President, Bell Atlantic granting Special Permission 90-367.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-219

In the Matter of

Routine Licensing of Large Networks of
Small Antenna Earth Stations Operating
in the 12/14 GHz Frequency Bands

NOTICE OF PROPOSED RULE MAKING

Adopted: April 12, 1990; Released: April 27, 1990

By the Commission:

I. INTRODUCTION

1. This notice proposes certain modifications to Part 25 of the Commission's rules governing the power limitations on very small aperture terminals (VSATs).[1] A VSAT network consists of a large number of technically identical small fixed-satellite earth stations that meet specified technical requirements and communicate only with other earth stations in that network through a satellite operating in the 12/14 GHz frequency band.[2] The Commission has approved the operation of many VSAT networks in various network configurations. The most commonly used configuration is the star network configuration in which small remote earth stations communicate among themselves and their central headquarters through a large hub earth station. [3]

2. In 1986, the Common Carrier Bureau ("Bureau") adopted technical standards for VSAT networks. In this initial *VSAT Order*,[4] the Bureau established a maximum inbound digital uplink transmitter power density of -14.0 dBW/4 kHz into a typical 1.2 meter, parabolic earth station antenna with a gross bit rate of 512 kbps,[5] and a maximum equivalent isotropically radiated power (e.i.r.p.) outbound transmitted satellite carrier density of +6.0 dBW/4 kHz.[6] In 1987, the Bureau established an inbound analog uplink transmitter power density limit of -8.0 dBW/4 kHz with a bandwidth of 200 kHz into a 1.2 meter earth station antenna and a maximum outbound transmitted satellite carrier power density of +13.0 dBW/4 kHz.[7] Several applicants now wish to exceed the power density limits by varying amounts, up to ten times higher than currently licensed systems.[8] In this order we propose to standardize and codify the technical showings applicants seeking high power operations must make. We also seek comment on whether the Commission should propose a general increase in power density limits.

II. BACKGROUND

3. Currently, blanket licenses for VSAT networks are required to meet the technical specifications of the *VSAT Order* and the *Declaratory Order*. When the Bureau first considered the licensing of VSAT systems, the applicants had submitted proposals for digital systems of a wide variety. Those systems had inbound links of various sizes of small earth station antennas (1.2 to 2.4 meters), a range of power densities into the small antennas (-25.6 to -14.0 dBW/4 kHz), a variety of digital data rates (2.4 kbps to 256 kbps) and gross bit rates (56 kbps to 512 kbps), a variety of modulation types (quadrature and binary phaseshift keying) with selective use of spread-spectrum techniques, and various forward error correction codes up to one-half rate. For the outbound link, there was a range in the central earth station antenna size (5.6 to 11.0 meters), a range from +0.5 to +10.3 dBW/4 kHz for satellite carrier e.i.r.p. density, a variety of digital data rates (57.3 kbps to 1.544 mbps), and a variety of gross bit rates (144 kbps to 3.088 mbps).

4. Several applicants now request that we reexamine the Bureau's findings in the *VSAT Order* and determine whether there is a technical basis for relaxing the VSAT power density limits. J.F. Lockett, Mobil Oil, and VSAT Systems, Inc. propose to exceed the satellite carrier spectral density limit by 5.2, 10.7, and 8.2 per carrier respectively. These applicants state that they need to operate at higher power density levels in order for their networks to communicate with smaller antennas (typically 1.2 meter), particularly in those regions where precipitation attenuation is a problem, *i.e.*, the Southeast and Gulf of Mexico regions. Previous successful VSAT licensees have overcome the precipitation attenuation problem by using larger antennas in those high precipitation regions. The applicants argue, however, that cost and competitive considerations preclude them from using larger antennas.

III. DISCUSSION

5. In order to provide the public with the fastest speed of service possible while maintaining adequate adjacent satellite interference protection, the Bureau defined baseline parameters for routine grant of typical digital VSAT networks in the *VSAT Order*. The Bureau defined baseline parameters for routine grant of typical analog VSAT networks in the *Declaratory Order*. It found the alternative of a separate or "case by case" review of each application using the *American Broadcasting Companies* [9] and *Reduced Orbital Spacing* criteria[10] to be undesirable because of the delay that would result.[11] The staff's analysis demonstrated that harmful interference could, in most cases, be avoided by imposing the following parameters for digital systems: power density of -14.0 dBW/4 kHz into a 1.2 meter earth station and a gross bit rate of 512 kbps for the inbound uplink; and for the outbound link, a maximum satellite carrier e.i.r.p. density of +6.0 dBW/4 kHz within the service area,[12] a gross bit rate of 3.088 mbps, and a central hub earth station with a 5.0 meter antenna for the outbound link.[13] Similarly, the staff found that interference incidents could further be avoided by imposing the following parameters for narrowband analog communications: power density of -8.0 dBW/4 kHz into a minimal 1.2 meter earth station antenna with a maximum bandwidth of 200 kHz for the inbound link; and for the outbound link, a maximum satellite carrier e.i.r.p. density of +13.0 dBW/4 kHz.[14]

6. From our experience in regulating VSAT networks, we know that most potential interference conflicts can be resolved. The staff's analysis in the *VSAT Order* indicated that digital data links operating at the power density levels set forth above were compatible with uniform 2^0 orbital

separations between satellites, a crucial component of the Commission's fixed-satellite licensing program. The staff conceded that although it was possible that transmissions at the baseline parameters could potentially cause unacceptable interference in isolated cases over portions of a transponder on an adjacent satellite, engineering techniques could be employed in practice to reduce interference to acceptable actual levels.[15] In general, operators of narrowband services, such as those typically provided over VSAT network facilities, have many remedial options available to them to achieve acceptable interference levels. These options include coordination with other services, cross-polarization, carrier frequency interleaving, larger antennas and increased use of error correction coding. Further, negotiations among licensees may result in using a co-channel transponder to carry companded single sideband, the use of full transponder digital or bandwidth-limited SCPC, more precise engineering analysis and coordination by the licensee of its use of these power density levels with the adjacent satellite user.[16]

7. Staff analysis of the VSAT systems pending before adoption of the *VSAT Order* showed that unacceptable levels of interference occur when the central earth station operates with power levels greater than those required for clear sky conditions. For that reason, the Bureau limited e.i.r.p. outbound downlinks to clear sky conditions (+6.0 dBW/4 kHz). It noted, however, that further study of this matter may permit the specifications of either standard fade margins or equivalent increases in outbound downlink power during precipitation. These power increases would have to be consistently applied to all licensees in order to avoid unacceptable interference between networks resulting from different power levels. We now request comment on whether either standard fade margins or permanent power limit increases should be approved. We request public comment on the impact a general relaxation of the digital and analog power density limits would have on the majority of the VSAT operators who have operated in the high precipitation regions without exceeding the current power density limits. We also request public comment on whether the technical parameters described in paragraph 3 represent an accurate depiction of the technical specifications contemplated for present and future VSAT systems. Finally, we note that in the course of formulating policy set forth in the Part 25 Notice of Proposed Rule Making in CC Docket No. 86-496,[17] proposals were made to increase the allowable 14 GHz digital power spectral density to -12 dBW/4 kHz, provided maximum downlink e.i.r.p. density is limited to 9 dBW/4 kHz.[18] We request comments on the feasibility of using a single power spectral density as a criteria for routine licensing of small antennas in a band and on the particular value to be used in each band.[19]

8. Further, in order to maintain our application processing efficiency, we propose to modify the Commission's VSAT application processing procedures in the following manner. (*See* Proposed Rule Section 25.134.) First, we propose to bifurcate the universe of possible VSAT applications. Each category will contain applications of facilities distinguished by their power densities. The first category will contain applications for digital and narrowband analog VSAT facilities with maximum outbound transmitted satellite carrier power densities of +6.0 dBW/4 kHz and +13.0 dBW/4 kHz, respectively, and maximum antenna input power densities of -14.0 dBW/4 kHz and -8.0 dBW/4 kHz, respectively, consistent with the *VSAT Order* and the *Declaratory Order*. These applications will continue to be processed routinely as specified in the *VSAT Order* and the *Declaratory Order*.[20]

9. The second category will contain applications for digital and narrowband analog VSAT facilities with transmitted satellite carrier power densities greater than +6.0 dBW/4 kHz and +13.0 dBW/4 kHz, respectively, and/or antenna input power densities greater than -14.0 dBW/4 kHz and -8.0 dBW/4 kHz, respectively.[21] Applicants filing Category 2 applications will be required to conduct an engineering analysis based on the criteria employed in Appendix C of *Reduced Orbital Spacing*. The most straight-forward method of communicating the results of that analysis is through the use of the Sharp, Adjacent Satellite Interference Analysis (ASIA) program.[22] Summaries of the Sharp ASIA program's output or its equivalent detailing potential interference shortfalls will be required to accompany every Category 2 application.[23] A narrative summary also must accompany the Category 2 application. This summary must indicate whether there are margin shortfalls in any of the current baseline services as a result of the addition of the new applicant's high power service, and if so, how the applicant intends to resolve those margin shortfalls. Category 2 applicants will be required to provide proof that all potentially affected parties consent to the use of the applicant's higher power density. In this regard, we request comment on the range of potentially affected parties. At a minimum, domestically, a co-channel, co-polarized carrier transmitted on an adjacent satellite 2^0 away would potentially be affected by higher power operations. Commenters may give their views on whether co-channel, co-polarized operations 4^0, 6^0 or more degrees away would fall within the definition. Finally, under our proposal, successful Category 2 licensees will bear the burden of obtaining operational agreements from potentially affected parties who are licensed in the future and who operate their facilities at the Category 1 level.

IV. CONCLUSION

10. We believe this proposal best balances the desires of those who wish to operate lower cost VSAT networks against the need to prevent harmful interference from occurring among the operating domestic satellites. Our obligation in this regard is to minimize interference conflicts. Thus, we will relax power restrictions in individual cases if commenters demonstrate that it is possible to do so without increasing interference to unacceptable levels among U.S. operators. Under our proposal, Category 2 applicants seeking densities in excess of currently prescribed limits will be required to comply with new Section 25.134(b) of the rules. However, we also seek comment on whether we should propose a general increase in power limits.

V. ADMINISTRATIVE MATTERS

11. Pursuant to the procedures set out in Section 1.415 of the Commission rules, 47 C.F.R. § 1.415, interested parties may file comments on or before **June 29, 1990** and reply comments on or before **July 30, 1990.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the

comments, provided that such information is placed in the public file and provided that the fact of the Commission's reliance on such information is noted in its *Report and Order*.

12. In accordance with provisions of Section 1.419, formal participants shall file an original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy of their comments, provided only that the docket number is specified in the heading. All comments are given the same consideration, regardless of the number of copies submitted. Comments and reply comments should be sent to: Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. All documents will be available for public inspection during regular business hours at the Commission's Public Reference Room at its headquarters, at Room 239 1919 M Street, N.W., Washington, D.C. 20554. For general information on how to file comments, please contact the FCC Consumer Assistance and Information Division at (202) 632-7000.

VI. EX PARTE PRESENTATIONS

13. For purposes of this non-restricted notice and comment Rule Making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1), if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy in duplicate of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum in duplicate to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must be clearly labelled "ex parte," state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

14. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and has been found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

15. We have determined that Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354) does not apply to this Rule Making proceeding because if promulgated, it will not have a significant economic impact on a substantial number of small entities.

16. Accordingly, pursuant to the authority contained in Sections 1, 4(i), 4(j), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 303, and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, we hereby give Notice of our proposals to adopt the rule revisions as set forth herein. The Secretary shall also cause a summary of the Notice of Proposed Rule Making to appear in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 25 of the Commission's Rules and Regulations (Chapter I of Title 47 of the Code of Federal Regulations) is proposed to be amended as follows:

Part 25 - Satellite Communications

1. The authority citation for Part 25 continues to read as follows:

AUTHORITY: §§ 25.101 - 25.531 issued under Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply Secs. 101-404, 76 Stat. 419-427; 47 U.S.C. 701-744.

2. A new Section 25.134 is proposed to be added to read as follows:

§ 25.134 Licensing provisions of very small aperture terminal (VSAT) networks.

(a) All applications for digital VSAT networks with maximum outbound downlink power densities of +6.0 dBW/4 kHz per carrier and maximum antenna input power densities of -14 dBW/4 kHz shall be processed routinely pursuant to *VSAT Order*. (Declaratory Order in the Matter of Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, 51 FR 15067 (April 22, 1986).) All applications for analog VSAT networks with maximum outbound downlink power densities of +13.0 dBW/4 kHz per carrier and maximum antenna input power densities of -8.0 dBW/ 4 kHz shall be processed routinely in accordance with the *Declaratory Order*.

(Declaratory Order in the Matter of Routine Licensing of Earth Stations in the 6 GHz and 14 GHz Bands Using Antennas Less than 9 Meters and 5 Meters in Diameter, Respectively, for Both Full Transponder and Narrowband Transmissions, 2 FCC Rcd 2149 (1987).)

(b) Each applicant for digital and/or analog VSAT network authorization proposing to use transmitted satellite carrier power densities in excess of +6.0 dBW/4 kHz per carrier and +13.0 dBW/4 kHz, respectively, and/or maximum antenna input power densities of -14.0 dBW/4 kHz and -8.0 dBW/4 kHz, respectively, shall conduct an engineering analysis comparable to the Sharp, Adjacent Satellite Interference Analysis (ASIA) program. Applicants shall submit tabular summaries of the ASIA program's output or its equivalent detailing potential interference shortfalls. Applicants shall also submit a narrative summary which must indicate whether there are margin shortfalls in any of the current baseline services as a result of the addition of the new applicant's high power service, and if so, how the applicant intends to resolve those margin shortfalls. Applicants shall provide proof by affidavit that all potentially affected parties consent to the use of the applicant's higher power density. Successful licensees shall obtain operational agreements from future licensees that are potentially affected and operating facilities at power levels in accordance with the *VSAT Order* and the *Declaratory Order*.

FOOTNOTES

[1] *See* Appendix.

[2] The precise frequency bands addressed here are 11.7-12.2 GHz (downlink) and 14.0-14.5 GHz (uplink).

[3] VSAT networks need not operate in a star network configuration, however, in order to comply with the requirements established in the *VSAT Order*. *See* note 4, *infra*. The rule modifications made in this proceeding will apply to all VSAT network configurations, not just star network configurations. *See* Contel American Satellite Co., DA 87-1834 (adopted December 15, 1987).

[4] Declaratory Order in the Matter of Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, 51 Fed. Reg. 15067 (Common Carrier Bureau, April 22, 1986) (*VSAT Order*).

[5] Typically, this entails the use of a small remote earth station transmitting into a larger hub earth station.

[6] Typically, this entails the use of a larger hub earth station transmitting to a smaller remote earth station.

[7] Declaratory Order in the Matter of Routine Licensing of Earth Stations in the 6 GHz and 14 GHz Bands Using Antennas Less than 9 Meters and 5 Meters in Diameter, Respectively, for Both Full Transponder and Narrowband Transmissions, 2 FCC Rcd 2149 (Common Carrier Bureau, 1987) (*Declaratory Order*).

[8] The applicants are J.F. Lockett & Associates, File Nos. 2922-2925-DSE-P/L-87; Mobil Oil, File Nos. 4530-4532-DSE-P/L-87; and VSAT Systems, Inc., File Nos. 1373/2567/2905-DSE-P/L-88. The proposal we make with this item will apply to these applicants and to others similarly requesting to exceed current power density limits.

[9] American Broadcasting Companies, Inc., 62 FCC 2d 901 (1977). In American Broadcasting Companies, Inc., we determined that small diameter antennas could be routinely licensed if a showing were made that their use was consistent with desirable orbital spacings between domestic satellites. Subsequently, in Licensing of Space Stations in the Domestic Fixed Satellite Service, 54 Rad. Reg. 2d 577 (1983), *recon. in part*, Licensing of Space Stations in the Domestic Fixed-Satellite Service and Related Revisions of Part 25 of the Rules and Regulations, 99 FCC 2d 737 (1985) (hereinafter *Reduced Orbital Spacing)*, we adopted a reduction in orbital spacing to 2^0 in both the 4/6 GHz and 12/14 GHz bands for the domestic fixed-satellite service.

[10] The engineering analysis in the *VSAT Order* is comparable to that employed in Appendix C of *Reduced Orbital Spacing*, *id.*

[11] *See, VSAT Order*, note 4 *supra*.

[12] The following formula is used for purposes of calculating power density values:

Power Density (dBW/4 kHz) = Pt + 36 dB-Hz - 10 log10B

where: Pt = total carrier power into the antenna in dBW or total satellite carrier power, as appropriate

B = SCPC r.f. bandwidth in Hz

The power density calculation incorporates a spreading factor that is determined in accordance with equation (11) of CCIR Report 792-1, "Calculation of maximum Power Density Averaged over 4 kHz of an angle-modulated Carrier". For digital transmissions, B = bandwidth occupied by the symbol rate (symbols/second) including error correction bits (Hz) for a phase shift keyed (PSK) SCPC carrier modulated by a digital energy dispersal signal of a pseudo noise (PN) sequence.

[13] *See, VSAT Order*, note 4 *supra*.

[14] *See, Declaratory Order*, note 7 *supra*.

[15] The potential levels of unacceptable interference using the baseline parameters did not exceed 3 dB on the inbound link and 4 dB for transmissions from the satellite on the outbound link.

[16] *See, e. g.*, RCA American Communications, Inc., File Nos. 1533/1534/1535/ 1536-DSS-MP-L-83 (released January 28, 1985).

[17] Notice of Proposed Rule Making in the Matter of Amendment of Part 25 of the Commission's Rules and Regulations to Reduce Alien Carrier Interference Between Fixed-Satellites at Reduced Orbital Spacings and to Revise Application Processing Procedures for Satellite Communication Services, 2 FCC Rcd 762 (1987) (Notice).

[18] *See*, Phase II Final Report of Advisory Committee on Implementation of Reduced Orbital Spacing Between Domestic Fixed-Satellites (June 30, 1986). However, a consensus was not reached and thus a formal Committee Recommendation regarding this proposal was not made.

[19] We also request comment on the feasibility of raising general power limits for inbound transmissions.

[20] In the event we adopt new general power increases, Category 1 applications would be those held within the new parameters specified in our Order.

[21] These densities would again be modified in accordance with any general power increase that we may adopt in this proceeding.

[22] The Sharp ASIA program is an updated version of the analysis used in *Reduced Orbital Spacing*, Appendix C. *See* note 9 *supra*. This model identifies over 200 baseline r.f. carriers. The Category 2 applicant would add its service as a new carrier. The

core baseline carriers span the range of services provided over both authorized and pending 12/14 GHz domestic satellite systems. Thus, the worst-case potential interference conflicts are included in this analysis. Carrier-to-noise (C/N) and other associated single-entry interference objectives for each of the carriers are calculated. For each of the r.f. carrier pairs, a carrier-to-interference (C/I) ratio is calculated using the methodology of CCIR Report No. 455-4. The margin shortfall values denoted in the Sharp ASIA matrix summary sheets is the amount, in dB, by which the calculated interference caused by the interfering r.f. carrier exceeds the single-entry objective for the wanted carrier.

[23] A description of the database used to conduct the applicant's analysis must also be included with the Category 2 application.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 27, 1990

PACIFIC'S NOTIFICATION OF ENHANCED SERVICE MARKET TRIAL (CC DOCKET NO. 88-616)

On April 6, 1990, Pacific Bell (Pacific) filed a Notification of a Market Trial of a facsimile (FAX) Store and Forward Service. Pacific states that its FAX Store and Forward Service will use the electronic messaging capabilities of its FAX Message Machine (FMM) to provide customers with new options for sending, receiving, and storing facsimile messages. In particular, Pacific will offer three services during the trial--FAX Overflow, FAX Mail, and FAX for Information Providers. Pacific adds that during a portion of the trial it may also provide voice prompts that allow the caller to leave a voice note associated with the FAX message. Pacific states that it may also offer customers the option of being notified of a waiting FAX message.

In addition, Pacific describes its plans for complying with the Bureau's conditions for conducting enhanced service market trials without filing comparably efficient interconnection (CEI) plans. (*See* BOC Notices of Compliance with CEI Waiver Requirements for Market Trials of Enhanced Services, 4 FCC Rcd 1266 (1989).) Pacific plans to start the market trial on July 9, 1990, ninety days from the date of its notification.

Pacific's Notification is available for inspection and copying, during normal business hours, in the FCC's Dockets Branch (Room 239), 1919 M Street, N.W., Washington, D.C. 20554. Copies of Pacific's Notification can also be obtained from the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037, (202) 857-3800.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE Telephone Operating Companies
Annual 1990 Access Tariff Filings

ORDER

Adopted: April 17, 1990; Released: April 27, 1990

By the Commission:

1. On December 21, 1989, the Common Carrier Bureau (Bureau) released a Memorandum Opinion and Order regarding the November 2, 1989, filings of the local exchange carriers (LECs) updating their annual access tariffs.[1] That Order suspended the tariff filings of several of the GTE Telephone Operating Companies (GTOCs). *December 21 Order*, paras. 11-12, 17, 48-50. On January 24, 1990, GTOC submitted a petition to vacate suspension and terminate investigation.

2. In its petition, GTOC states that as a result of the suspension it has reduced its CCL revenue requirement by $13.6 million on an annualized basis. GTOC Petition at 2. GTOC has determined to make this adjustment rather than to go forward with its proposed rates, due primarily to timing and limited resources. *Id.* GTOC has also recalculated the pooled premium and non-premium terminating CCL rates, and attaches this recalculation. *Id.* at Attachment. GTOC says that upon grant of this petition, GTOC will revise its Tariff F.C.C. No. 1 to show the new pooled CCL rates and to return the End User federal interstate access (FIA) rates for multi-line business and Centrex I customers in Hawaii, Illinois, and Indiana to the rates that existed prior to the Tariff Update Format filing.

3. We are persuaded that going forward with an investigation at this time would not serve the public interest. We therefore grant GTOC's petition to vacate the suspension of these rates and to terminate the investigation initiated by the Bureau.

4. Accordingly, IT IS ORDERED that the petition to vacate the suspension and terminate the investigation filed by GTE Telephone Operating Companies IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] January 1, 1990, Local Exchange Carrier Access Tariff Filings, Memorandum Opinion and Order, 5 FCC Rcd 89 (Com.Car.Bur. 1989) (*December 21 Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

VALLEY BROADCASTERS, INC. KAPS, Mount Vernon, Washington	**BC Docket No. 82-436** File No. BP-801112AB
NORTHWEST INDIAN WOMEN BROADCASTERS, INC. Portland, Oregon	**BC Docket No. 82-437** FILE NO. BP-801113AD

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 1990; Released: April 27, 1990

By the Commission:

I. BACKGROUND

1. Before the Commission are an Application for Review of the Review Board's Decision filed by Northwest Indian Women Broadcasters, Inc. (Indian Women), on September 26, 1986 and related pleadings.[1] These pleadings relate to a Decision of the Review Board granting the application of Valley Broadcasters, Inc. (Valley), for a new standard broadcast station in Mount Vernon, Washington and denying Indian Women's application for Portland, Oregon. *Valley Broadcasters, Inc.*, 104 FCC 2d 1549 (Rev. Bd. 1986). Valley presently operates KAPS, a daytime-only AM station with a directional antenna. It proposes to modify its facilities to broadcast fulltime, on a new frequency, with increased power, and using a perimeter current antenna (PARAN). The PARAN system consists of four towers arranged in a square. It is useful in situations, like that faced by Valley, where there is limited ground area for a transmitter site. It radiates a nondirectional AM signal comparable to that of a much taller monopole tower. 104 FCC 2d at 1556 ¶ 9. The Board affirmed a summary decision granted by Administrative Law Judge Byron E. Harrison (ALJ) on an issue to determine whether Valley's proposed use of a PARAN antenna would conform to the Commission's technical standards. *Memorandum Opinion and Order*, FCC 83M-935 (Mar. 21, 1983).

2. The Board also approved the ALJ's Initial Decision, FCC 86D-9 (Feb. 13, 1986), that awarded a dispositive transmission service preference pursuant to 47 U.S.C. § 307(b) in favor of Valley for providing Mount Vernon with its first competitive nighttime local transmission service. 104 FCC 2d 1564. Portland, Oregon presently has 19 commercial aural broadcast facilities assigned to it.

II. PARAN ANTENNA ISSUE

3. The issue here is whether Valley's application satisfies the Commission's basic technical requirements in light of its proposed use of a PARAN antenna system. By *Order*, FCC 87I-064 (June 29, 1987), the Office of General Counsel (OGC) requested all parties, including the Mass Media Bureau, to file comments on whether there remains a substantial and material question of fact on this point.[2] Although OGC received comments from all the parties, none of them addressed the effect on this issue of the Commission's 1986 authorization of the use of a PARAN antenna in connection with the experimental synchronous operation of radio station KIPA in Hilo, Hawaii. On November 21, 1988, the Commission released an *Order*, 3 FCC Rcd 6734 (1988), soliciting the parties' comments on the relevance of the KIPA experience to this proceeding. Furthermore, we directed the Bureau to submit its computer analysis of Valley's proposal, and any other underlying documentation that supports its conclusion that Valley's PARAN antenna will operate substantially as proposed in compliance with the Commission's efficiency standards. *Order*, 3 FCC Rcd at 6735 ¶ 14. We now have the parties' submissions on this latter issue as well. [3]

4. Indian Women submits that there is no new evidence in the record that supports Valley's claim that its proposed use of a PARAN antenna system can conform to the Commission's efficiency standards. Furthermore, according to Indian Women, the KIPA experimental PARAN antenna is of no assistance in this regard because the measurements were not taken in substantial compliance with the Commission's Rules. Thus, it argues there is no basis for favorable summary decision of the PARAN antenna issue and Valley's application must be denied.

5. Valley has consistently argued that the basic issue in this case is which applicant better meets the test of section 307(b) to provide a fair, efficient, and equitable distribution of radio service. To Valley, it is irrelevant for Indian Women to challenge the adequacy of Valley's proof that the PARAN antenna will meet the Commission's standards. Valley argues that the antenna issue is not comparative; it lies solely between Valley and the Commission, and the Bureau is satisfied with Valley's submission. Moreover, Valley now submits that its consulting engineer has evaluated the KIPA antenna's performance and finds it to be totally consistent with Valley's coverage proposal.

6. The Bureau evaluated the data relating to the KIPA experimental authorization and found that they establish that the PARAN antenna used there produced a pattern that is essentially circular and is operating within the Commission's efficiency standards. Most significantly, the Bureau concluded that the KIPA antenna is functioning as predicted: "The actual radiation as reflected in field measurements is virtually the same as the theoretical RMS." Mass Media Bureau's Comments in Response to Commission's Order, p. 4 (Jan. 19, 1989).

7. In its Consolidated Reply Comments, Indian Women attacks the Bureau's acceptance of the KIPA measurements because they were not based on the prescribed methodology (47 C.F.R. § 73.186) for taking such measurements. Indian Women also repeats its argument that the Bureau's computer analysis does nothing more than verify the calculations that were contained in Valley's original application. This, they contend, does nothing more than confirm that "if Valley's claimed antenna effi-

ciency is *assumed* to be correct, the antenna will radiate the signal strength required by the Rules." Consolidated Reply Comments, p. 8. Furthermore, Indian Women argues that the report of the Commission's Office of Engineering and Technology (OET), submitted with the Bureau's comments, in effect, required applicants proposing the use of a PARAN antenna system "to set up a test transmitter and submit 'a complete field intensity survey.'" *Id.* at 14 citing 47 C.F.R. § 73.189(b)(5).

8. In its Reply Comments, Valley submits an engineering statement supporting the Bureau's findings that the KIPA measurements were derived in a manner consistent with Commission rules and confirming that the PARAN system can be operated within the Commission's efficiency standards.

9. As we have stated previously, it is the Commission's intention to foster the development and use of new technology in a manner that will promote the most efficient use of the spectrum for the public. *Order*, 3 FCC Rcd at 6735 ¶ 11, citing 47 U.S.C. § 157. It is clear that Valley's proposal to use the PARAN system involves the use of new technology. It is equally clear that the use of such a system would be in the public interest because it would allow stations to locate their transmitter sites in areas previously unavailable due to height or ground area restrictions.

10. If Valley's application had been unopposed and granted, conditioned on its compliance with Commission efficiency standards, the results of a full proof of performance would have resolved the questions raised in this proceeding long ago. However, the context in which the PARAN issue presents itself here is in a comparative hearing. Based on the submissions of the parties and the record before us, we do not think that fact requires a different result.

11. Nonetheless, we disagree with Valley's assertion that, because the antenna issue is not comparative, it is not subject to Indian Women's challenge. Before the Commission can conclude that Valley is a qualified applicant, it must satisfactorily resolve the issue relating to the PARAN system. It is established Commission law that each applicant must demonstrate its basic qualifications before a section 307(b) choice can be made. *See Guinan Realty Co. v. FCC*, 297 F.2d 782 (D.C. Cir. 1961). As a collateral matter, the PARAN antenna issue must be resolved so that the parameters of Valley's service area can be determined for a comparison of the reception aspects of the applicants' proposals.

12. We believe that the record, as it now exists, supports the conclusion that the PARAN system will operate substantially as proposed. The system, while new to commercial radio, has been used successfully by the U.S. military and in Europe. *Valley Broadcasters, Inc.*, 104 FCC 2d at 1556 ¶ 9. In a study prepared by the Office of Engineering and Technology in connection with the use of a PARAN system in KIPA's experimental application, it was noted that an antenna configuration much like that proposed by KIPA was tested by Continental Electronics with favorable results in the 1970's. Mass Media Bureau's Comments in Response to Commission's Order, Attachment 3, p. 1 (Aug. 25, 1986). A later test at LF (low frequencies) suggested some arcing and undesirably narrow bandwidth at 36 kHz, but the report indicated such would probably not occur at medium frequencies which are at least 14 times higher. *Id.* Of significance is the following statement in OET's report: "There is every reason to believe that as a source of radiation the antenna is not different from top-loaded antennas already authorized." *Id.* at 2.

13. Thus, there was a substantial amount of information relating to PARAN technology available to the Commission in 1986, sufficient for OET to recommend that "this type of antenna be tested in broadcast applications to gain experience with its efficiency and bandwidth." *Id.* Indian Women argues that OET's statement confirms that stations proposing the use of a PARAN system must *first* submit a complete field intensity survey as prescribed by Section 73.189(b)(5). To the extent that Indian Women interprets this statement to mean that a field intensity survey must be completed prior to the issuance of a construction permit, we disagree. The purpose of the rule is to assure that applicants propose systems that will operate in accordance with the Commission's technical standards. The full proof of performance required by the condition to the grant will produce the same data as required by Section 73.189(b)(5). Thus, the public interest will be protected because no license would be granted until Valley demonstrates compliance with all applicable rules and regulations.

14. In the original hearing designation order (HDO), the Commission specified an issue to explore the performance capabilities of Valley's proposed PARAN system to determine whether it can comply with the Commission's technical requirements *because the effectiveness of this type of antenna had not been established in the United States*. 47 Fed. Reg. 34621, 34622 ¶ 10 (August 10, 1982) (emphasis added). Essential to such a determination were the heights and configuration of the towers. The Commission found Valley's application to be lacking in this regard and requested that Valley file a clarifying amendment supplying this information. *Id.*

15. It was based upon this submission that the Bureau prepared its computer analysis. Given the information already available, the Bureau could deduce that the concept upon which the PARAN system was based was sound. Previous experience demonstrated that such a system would produce a signal, essentially non-directional, with a field intensity equal to that of a much taller monopole antenna. Those facts were not at issue. Therefore, by analyzing the data supplied in the clarifying amendment in light of existing studies, the Bureau was able to confirm that Valley's proposed antenna system would most probably operate as proposed.

16. Even so, if there was any doubt about the PARAN system's capability to perform as predicted, it was put to rest by the KIPA experience. The Bureau accepted KIPA's proof of performance after additional measurements were taken. No license was issued because none is required for an experimental authorization.

17. Indian Women argues vehemently that "KIPA's methodology for proving the performance of its Paran antenna is a farce." Indian Women Consolidated Reply Briefs, p. 5 (Feb. 3, 1989). KIPA was unable to perform ground measurements on more than three radials because the area surrounding the transmitter site was either lava or water. KIPA took 32 readings on the 158^0 radial as well as five each on the 39^0 radial and the 65^0 radial. These data demonstrated that the antenna was operating with an efficiency of approximately 290 mV/m/kW at one kilometer. However, the Bureau notified the applicant that additional field strength measurements were required. Because the transmitter was located on a lava field adja-

cent to the ocean, the measurements had to be taken from a helicopter. KIPA compared its helicopter readings on the 160^0 radial with its ground readings on the 158^0 radial and established an adjustment figure that was used on all seven of the radials where measurements were taken by helicopter.

18. Indian Women argues that there was less than adequate support for the assumption that "the 71% deviation in the helicopter-measured field strengths from the field strengths ground-measured on the 158^0 radial was attributable solely to the presence of the helicopter." Consolidated Reply Comments, p. 4. The use of "adjusted" data in lieu of of actual data will produce any result desired, opines Indian Women. *Id.* at 5.

19. Nonetheless, we agree with the Bureau that, although the use of a helicopter to take field measurement is unusual, it is an acceptable procedure where, as here, necessary measurements must be taken at otherwise inaccessible locations. *See* Mass Media Bureau's Comments in Response to Commission's Order, p. 3. Furthermore, those measurements are sufficiently consistent with the ground measurements, when associated with the information already available about the PARAN system, to establish that the antenna will conform to our minimum efficiency standards. Thus, on the record before us, Valley has established that the PARAN system will function as predicted. We agree with both Valley and the Bureau that, based on the record, the actual radiation as reflected in field measurements will be virtually the same as that proposed. *See* Mass Media Bureau's Comments in Response to Commission's Order, p. 4. Because field strength measurements can, to some extent, be modified by adding or subtracting 20-feet tower segments, and because of the value of the information to the Commission in processing further applications proposing the use of a PARAN system, we will condition the grant as requested by the Bureau. Accordingly, the requirements of section 73.189(b)(5) can and will be met, in this instance, by a conditioned grant as the Bureau recommends.

III. SECTION 307 (b) ISSUE

20. Valley proposes to serve Mt. Vernon, Washington and Indian Women would serve Portland, Oregon. The Commission must, therefore, determine which of the proposals would best provide a fair, efficient, and equitable distribution of radio service. *See* 47 U.S.C. 307(b). As the Board correctly observed, if a determination can be made under section 307(b) favoring one community over another, then "only applicants specifying the favored community are given further consideration under the standard comparative issue." *Valley Broadcasters, Inc.*, 104 FCC 2d at 1559 ¶ 12, citing *WHW Enterprises, Inc.*, 753 F. 2d 1132 (1985). The "fair, efficient, and equitable" standard of section 307(b) for broadcast service distribution "looks to the relative needs of the respective proposed service areas for a 'reception service' (no concern for a specific point of origin) and to the relative needs of the proposed communities of license for a new 'transmission service' (community of license is the point of origin)." *Valley Broadcasters, Inc., Initial Decision*, FCC 86D-9 at 17, citing *Kent Ravenna Broadcasting Co.*, 44 FCC 2603 (1961). As the Board correctly pointed out, transmission service measures the relative needs in terms of existing facilities and population in each competing community, while reception service measures the number of program choices available to listeners but is significant only where the proposed service area is underserved. *Valley Broadcasters, Inc.*, 104 FCC 2d at 1559 ¶ 12.

21. The ALJ awarded a dispositive preference to Valley for both transmission and reception service. The Board approved the transmission service preference, but denied the reception service preference because of unresolved questions concerning the extent of Valley's proposed service area. *Id.*, at 1562 ¶ 15.

A. Transmission Service

22. We agree that the ALJ and the Board properly awarded a transmission service preference to Valley on the existing facts before them. However, in its requests for official notice, Indian Women asserts that intervening core changes in circumstances require the Commission to reverse Valley's dispositive 307(b) preference. Both requests are directed solely to the issue of transmission service. First, it asks us to take official notice of the fact that the Commission has authorized noncommercial educational station KSVR(FM), Mount Vernon, Washington to increase its effective radiated power to 100 watts. Notice of this change is required, Indian Women claims, because the Board had referred to the fact that KSVR(FM) was only an 18-watt station operating part-time and that it was therefore not significant, in any event, to the transmission analysis. We do take notice of this fact, but not, as explained below, because the fact itself affects our determination in this case. Rather, we consider this matter to clarify the law concerning whether the existence of noncommercial educational stations should be considered in the transmission service analysis.

23. Although the Review Board in this case correctly cited *Kaldor Communications, Inc.*, 98 FCC 2d 292, 294 n.4 (Rev. Bd. 1984), for the proposition that noncommercial service has not been relevant for section 307(b) purposes, we no longer believe that *Kaldor* should be the law. The premise of *Kaldor* was that "the Commission's rules on radio station application acceptability exclude consideration of noncommercial AM and FM stations in determining the number of other radio services to underserved areas. 47 CFR 73.37, Note 7." *FBC, Inc.*, 95 FCC 2d 256, 260 ¶¶ 10-11 (Rev. Bd. 1983). However, the Commission amended section 73.37(e) and deleted note 7 in December 1985. *Deletion of AM Application Criteria in § 73. 37 (e) of the Commission's Rules*, 59 RR 2d 521 (1985). Thus, the basis for the holding in *Kaldor* no longer exists.

24. Moreover, the *Report and Order* by which note 7 was added to section 73.37 provided that the Commission should determine the adequacy of aural service to a community from existing stations without including service provided by noncommercial educational AM and FM stations. 39 FCC 2d 642, 672 (1973). The stated goal of the Commission in 1973 was to provide two "competing voices" to each community, and a noncommercial educational station was not considered a "voice" in the community. *Id.* As support for this position, the Commission noted that over 60 percent of the FM educational stations at that time were Class D stations limited to 10 watts, which were used by educational institutions primarily for the benefit of the student body; that such stations operated at irregular intervals; and that they often served as training facilities for communications students. *Id.* Moreover, even higher power educational stations in 1973 were exempted from many of the operating requirements im-

posed on commercial stations -- such as operating a minimum number of hours per day, ascertaining community needs and interests, providing programming to meet those needs and interests, and serving the community of license with a minimum required field intensity. *Id.*

25. The regulations governing noncommercial radio have changed markedly since that time. For instance, in 1978, the Commission amended its rules to encourage Class D educational FM stations either to increase the power of their facilities to at least the minimum Class A level of 100 watts ERP or to move to an available commercial channel on a secondary basis. *Second Report and Order, Noncommercial Educational FM Stations*, 44 RR 2d 235 (1978). Significantly, the Commission also stated that it would not accept any new applications for Class D 10-watt stations. *Id.* at 246. In the same proceeding, the Commission adopted 47 C.F.R. § 73.561, which, in part, requires all noncommercial educational stations to operate a minimum of 36 hours per week. This rule also requires a station to operate a minimum of 12 hours per day in order to avoid the risk of having to operate on a shared-time basis with another station.

26. Subsequently, in 1984, after *Kaldor* was decided, the Commission adopted an issue responsive programming rule for noncommercial educational stations that is essentially identical to that applicable to commercial radio stations. *Public Broadcasting*, 98 FCC 2d 746, 755 (1984). Accordingly, there is no question now that all noncommercial educational stations have an obligation to serve the significant programming needs of their communities. *Id.* at 752. Therefore, there is no legitimate public interest purpose served in exempting all noncommercial educational stations from transmission service analyses, and we specifically overturn those portions of *Kaldor*, 98 FCC 2d at 294 n.4, and *FBC*, 95 FCC 2d at 260-61 ¶¶ 10-11, that hold otherwise.

27. The March 4, 1987 grant of Station KSVR(FM)'s request to increase its ERP to 0.100 kw is consistent with current policy, as set forth above, and and thus it raises a question of fact as to whether Valley's proposal will bring a first competitive nighttime service to Mount Vernon. Because the ALJ closed the record without considering the existence of KSVR(FM)'s noncommercial service and before its increase in power, there is no evidence in the record as to what portion of Mount Vernon will be able to receive KSVR(FM) either day or night, or the effect, if any, of this service on the transmission service analysis in this case.

28. As previously noted, Indian Women's second request for official notice is also directed solely to the transmission service analysis. On December 1, 1987, the Commission released a report and order in MM Docket No. 87-131 proposing to allow existing AM daytime-only stations to operate on a fulltime basis with reduced power. *Unlimited - time Operation by Existing AM Daytime - Only Radio Broadcast Stations; Discontinuance of Authorization of Additional Daytime - Only Stations; Minimum Power of Class III Stations*, 2 FCC Rcd 7113 (1987). Valley's daytime-only station, KAPS, presently operates on 1470 kHz, one of the frequencies affected by the report and order. In response to a show-cause order, Valley notified the Commission that on January 20, 1988, KAPS would commence fulltime operation at 17 watts nighttime. Indian Women Second Request for Official Notice of New Fact, February 22, 1988, at Attachment B.

29. This development also raises a question of fact as to the extent to which, if any, Valley's proposal will bring first competitive nighttime service to Mount Vernon. Because the ALJ closed the record in this case before the Commission amended its rules to permit limited nighttime operation by daytime-only AM stations, there is no evidence in the record as to what portion of Mount Vernon will now be able to receive KAPS at night. However, we need not determine the nature or extent of the impact, if any, that either of these changes in circumstances may have on the transmission service analysis in this case, because of our determination below that Valley is entitled to a dispositive reception service preference.

B. Reception Service

30. As discussed above, Valley has established that the PARAN antenna will perform as predicted. Therefore, the Board's concerns regarding the reception service question are no longer relevant. Valley's proposal will provide a first service to five times as many persons as Indian Women's proposal, nearly twice as many persons with a second service and more than three times as many persons with a third service. 104 FCC 2d at 1567-8 ¶¶ 7, 9 and 1584 ¶ 5. Although Indian Women established that it would serve a larger underserved geographic area, the ALJ correctly concluded that Valley's proposal was preferred. *See Meredith Colon Johnson*, 33 FCC 2d 324, 332-34 ¶¶ 25-27 (Rev. Bd. 1972), aff'd 39 FCC 2d 782 (1973) (an applicant proposing to serve the greater underserved population is to be preferred over one that would serve a larger underserved area but fewer people). Furthermore, Indian Women argues that it is entitled to a reception service preference because it would provide service to a greater population overall than would Valley. However, no reception preference is warranted for areas already receiving five or more services. *See Archilla - Marcocci Spanish Radio Co.*, 104 FCC 2d 405, 406 n.2 (1986). On the basis of the above, Valley is entitled to a dispositive reception service preference.

IV. OTHER MATTERS

A. Minority Preference

31. Indian Women argues that the Board erred in failing to award it credit for minority ownership in the section 307(b) analysis, citing *Clear Channel Broadcasting in the AM Broadcast Band*, 78 FCC 2d 1345, 1368-69 ¶ 71 (1980) for the proposition that "fostering the participation of heavily under-represented minorities in the ownership and the operation of broadcast stations" is of high importance. There, the Commission amended its rules to establish special provisions for acceptance of minority applications. However, the Supreme Court has made it clear that section 307(b) requires the Commission to first determine which community has the greater need for additional service and then determine which of the applicants proposing to serve that community is best suited to do so. *See FCC v. Allentown Broadcasting*, 349 U.S. 358 (1955). The identity of the party providing service has never been considered a factor in assessing a community's service needs in this context. Thus, the Board correctly held that minority ownership was not an element of the section 307(b) analysis in this case. *Valley Broadcasters, Inc.*, 104 FCC 2d at 1562 ¶ 15.

B. Site Intervention and Lack of Candor

32. Finally, Indian Women argues that the Board's rulings on site intervention and lack of candor issues were contrary to fact and precedent. We have reviewed both arguments and find them lacking in merit. Because they are basically the arguments made to and rejected by the Board, we see no need to rehash them here. *See* 104 FCC 2d at 1551-1556.

C. Motion to Enlarge Issues

33. On February 23, 1990, Indian Women filed a Motion to Enlarge Issues alleging that Valley, as shown by a communication from the office of Congressman Al Swift, has solicited and engaged in *ex parte* contacts with the Commission, prohibited by 47 C.F.R. § 1.1202, *et seq.* Indian Women argues that Valley's actions place in question its licensee qualifications and asserts that Valley's application in this proceeding should be dismissed. Valley opposes the motion because the only contacts made with Commission personnel were either inadvertent and unauthorized or mere status checks.

34. We have reviewed the pleadings on this issue thoroughly and find that Indian Women has failed to demonstrate a *prima facie* case that would, if proved, warrant disqualification of Valley as an applicant. As it relates to this proceeding, an ALJ, if he were to hear such an issue, would have only two alternatives -- either to find that Valley's actions were so willful and repeated as to disqualify it from being a licensee or to find that it remains fully qualified -- because demerits relating to character qualifications are no longer authorized in comparative proceedings. *See Broadcast Associates of Colorado*, 104 FCC 2d 16, 18-19 (1986). Indian Women has failed to demonstrate that Valley's actions were so egregious that they merit the severe sanction of disqualification. Thus, a remand of this case to try an *ex parte* issue would serve no useful purpose.

35. In this case there is no evidence that Valley solicited any *ex parte* communications. In fact, the declarations of both the president of KAPS and Congressman Swift clearly state that it was understood that the communication was specifically for Congressman Swift's information and was not to be forwarded to the Commission. Moreover, it appears that the communication was inadvertently forwarded to the Commission as a routine inquiry concerning administrative delay by a member of Congressman Swift's staff without the knowledge of the Congressman.

36. In any event, the sanctions applied even in cases where the prohibited conduct has been egregious have been less than outright disqualification. For example, in *Desert Empire Television Corp.*, 88 FCC 2d 1413, 1416-1418 (1982), the Commission, in a situation where the licensee engaged in repeated *ex parte* violations, some after being apprised of the Commission's requirements and issuance of a statement by the licensee affirming its thorough understanding of the Commission's Rules concerning *ex parte* communications, levied a forfeiture on the applicant but did not disqualify it from being a licensee.[4] Accordingly, even assuming arguendo that Indian Women's allegations were valid, the severe sanction of disqualification would clearly be inappropriate and therefore we will not designate an *ex parte* issue.[5]

V. CONCLUSIONS

37. In conclusion, we find that the record supports Valley's claim that the PARAN system will operate substantially as proposed. It follows, therefore, that because Valley's proposal includes the greater underserved population, it is entitled to a dispositive preference for Section 307(b) reception service. All other decisionally significant arguments raised by Indian Women have been considered and rejected. A grant of Valley's application will therefore better provide a fair, efficient and equitable distribution of broadcast service and best serve the public interest, convenience, and necessity.

VI. ORDERS

38. ACCORDINGLY, IT IS ORDERED, That the Requests for Official Notice of New Fact filed March 11, 1987 and February 22, 1988 by Northwest Indian Women Broadcasters, Inc., ARE GRANTED to the extent reflected above.

39. IT IS FURTHER ORDERED, That the Motions to Strike the requests for Official Notice of New Fact filed April 1, 1987 and March 6, 1988 by Valley Broadcasters, Inc., ARE DENIED.

40. IT IS FURTHER ORDERED, That the Application for Review filed September 26, 1986 by Northwest Indian Women Broadcasters, Inc. IS DENIED.

41. IT IS FURTHER ORDERED, That the Motion to Enlarge Issues filed February 23, 1990 by Northwest Indian Women Broadcasters, Inc. IS DISMISSED.

42. IT IS FURTHER ORDERED, That the application of Northwest Indian Women Broadcasters, Inc. (File No. BP-801113AD) IS DENIED, and the application of Valley Broadcasters, Inc. (File No. BP-801112AB) for authority to modify the operation of Station KAPS, Mount Vernon, Washington IS GRANTED, subject to the following conditions:

(1) Before program tests are authorized, permittee shall submit a complete proof of performance to establish the efficiency is at least 284.85 mV/m/kW at one kilometer and that the radiation pattern is essentially nondirectional as proposed. The proof shall include at least eight approximately equally-spaced radials with sufficient close-in points such that the inverse distant fields can be clearly established.

(2) The permittee will perform vertical current distribution measurements on each tower of the PARAN antenna to assure that the nighttime skywave radiation will be as proposed in the Valley application.

(3) Permittee shall submit a log of adjustments performed to achieve final operation of the antenna.

(4) Permittee shall submit field strength measurements along 0 degrees, 90 degrees, 180 degrees and 270 degrees bearing with only one of the four towers radiating.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The following responsive pleadings were filed in this proceeding: (a) an Opposition to Application for Review filed October 14, 1986 by Valley Broadcasters, Inc.; (b) an Erratum to Opposition filed October 27, 1986 by Valley; (c) a Request for Official Notice of New Fact filed March 11, 1987 by Indian Women; (d) Comments of Valley Broadcasters, Inc. on Indian Women's Request for Official Notice of New Fact filed March 27, 1987 by Valley; (e) a Motion to Strike filed April 1, 1987 by Indian Women; (f) a Second Request for Official Notice of New Fact filed February 22, 1988 by Indian Women; (g) a Motion to Strike Second Request for Official Notice of New Fact filed March 8, 1988 by Valley; (h) an Opposition filed March 16, 1988 by Indian Women; (i) a Reply to Opposition to Motion to Strike filed March 28, 1988 by Valley; (j) a Motion to Enlarge Issues filed by Indian Women on February 23, 1990; (k) an Opposition to Motion to Enlarge Issues filed by Valley on March 19, 1990; and (l) a Reply to Opposition filed by Indian Women on March 28, 1990.

[2] In response, the following pleadings were filed: (a) Mass Media Bureau's Response to Commission Directive (Bureau Comments) filed July 23, 1987; (b) comments by Valley and Indian Women filed on July 29, 1987; and (c) responses by Valley and Indian Women filed on August 12 and 13, respectively.

[3] The following pleadings were filed: (a) Comments by Indian Women filed on December 20, 1988; (b) Comments by Valley filed on December 21, 1988; (c) Comments in Response to Commission's Order by Mass Media Bureau filed January 19, 1989; (d) Consolidated Reply Comments by Indian Women and Reply Comments by Valley filed February 3, 1989.

[4] Indian Women's citation of *Stearns County Broadcasting Company, Inc.*, 104 FCC 2d 688 (1986), rev. den. 3 FCC Rcd 2987 (1988), where the sole applicant's application was dismissed, is inapposite. That case involved numerous contacts before and after a specific warning against such activities.

[5] In its Reply to Opposition, Indian Women expresses its concern that the "chronology" prepared by Valley's Counsel and submitted to Congressman Swift may be considered by the Commission. In this regard, Indian Women claims to have disputed "every fact and legal assertion contained" therein. The submission was not considered in the deliberative process in this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

UTICA TELEPHONE COMPANY	File No. 04202-CL-MP-90
For authorization to modify existing facilities on Station KNKA468 in the Domestic Public Cellular Radio Telecommunications Service in Market 115 A, Utica-Rome, New York MSA	File No. 04288-CL-MP-90

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 1990; Released: May 1, 1990

By the Chief, Mobile Services Division:

I. BACKGROUND

1. Before us are two Petitions to Deny filed by Utica-Rome Cellular Partnership (Utica-Rome), directed against the captioned applications for major modifications of the cellular facilities of Utica Telephone Company (Utica Telephone). Both parties have filed responsive pleadings. Utica-Rome is the Block B cellular licensee in the Utica-Rome New York, Metropolitan Statistical Area (MSA), and Utica Telephone is the licensee for the Block A cellular system in the Utica-Rome MSA. Captioned application File No. 04202-CL-MP-90 proposes construction of an additional cell at Old Forge, and an increase of power at the existing Star Hill cell site, resulting in an extension of the 39 dBu contour of that cell outside the MSA into a neighboring Rural Service Area (RSA). Application File No. 04288-CL-MP-90 proposes the construction of an additional cell near Paris, resulting in an extension of the 39 dBu contour into the Syracuse MSA and an adjacent RSA. In addition, Utica-Rome has filed a "Motion for Acceptance of Pleading Nunc Pro Tunc" with regard to its late-filed Petition to Deny Utica Telephone's captioned application File No. 04202-CL-MP-90, and a "Motion to Strike or Reply to Opposition to Motion for Acceptance of Pleading Nunc Pro Tunc." Utica Telephone filed a responsive pleading.[1]

II. CGSA COVERAGE

2. In both of its petitions to deny, Utica-Rome argues that Utica Telephone has counted reliable signal area generated by a cell site in the neighboring Syracuse MSA (belonging to Syracuse Telephone Company) towards the total coverage of its service in the Utica-Rome MSA.[2] Utica-Rome points out that without the portion of Syracuse's 39 dBu contour which extends into the Utica-Rome MSA, Utica Telephone would not meet the 75% coverage requirement. Utica-Rome also argues that the common ownership and the joint operating agreement raise questions which warrant further investigation by the Commission. For instance, Utica-Rome argues that if a contractual agreement does not exist and if funds have not been transferred from Syracuse to Utica Telephone in connection with the joint operation, then "such revelations would confirm that the common ownership of the two systems had resulted in anticompetitive cross-subsidies affecting the Block B licensees and the system subscribers . . . . " Utica-Rome Petitions at page 5.

3. In opposition, Utica Telephone argues that because the Syracuse Telephone Company system and the Utica Telephone system are in fact commonly owned, and are operated jointly, either entity should be able to claim the 39 dBu contour coverage of the other. In addition, Utica Telephone argues, Utica-Rome has no basis for its argument that anti-competitive cross-subsidies exist. Utica Telephone has filed an amendment to each captioned application decreasing its CGSA within the Utica-Rome MSA, so that the area of 39 dBu contour coverage is at least 75% of the total CGSA area, as required by Section 22.903(a).

4. Section 22.903(a) states in pertinent part: "For MSAs . . . below the top-90, the boundaries of the CGSA must include at least 75% of either the land area or population of the MSA . . . An applicant must state that the combined 39 dBu contours of all base stations will cover at least 75% of the total CGSA." An extension of a licensee's authorized CGSA into an area not served by the carrier is generally prohibited, unless the extension is *de minimis*.[3] *See Orange County - Poughkeepsie Limited Partnership*, 3 FCC Rcd 1191 (Mob. Serv. Div. 1988). However, an extension of the 39 dBu contour into an adjacent MSA is permitted where the carrier requesting the extension receives permission from the corresponding carrier in the adjacent market. *Id.* at 1191. In these cases the size of the extension is solely a matter of agreement between the two licensees. *Id.* These overlaps are in the public interest because they may tend to facilitate the provision of continuous service between the MSAs and "enhance the potential for intersystem handoffs." *Id.*

5. Where adjoining licensees agree to an extension across an MSA border, the extension may be counted towards the total service area of the licensee in the market into which the extension extends, because the extension serves customers.[4] Therefore, Utica Telephone may use the 39 dBu contour areas which extend into its market from a transmitter located in a neighboring MSA to meet the 75% coverage requirements in its own market so long as the adjoining licensee agrees. Accordingly, Utica Telephone's applications are not defective for failure to show compliance with the 75% coverage rule.

6. We deny Utica-Rome's request for an investigation into the terms of, and compliance with, the joint operating agreement. Utica-Rome has not provided any facts in support of its general allegation that anti-competitive practices may exist in connection with the joint operation agreement between Syracuse Telephone Company and Utica Telephone Company. In this regard, the only allegation made by Utica-Rome is that if funds and costs are not shared between the two systems this results in anticompetitive cross-subsidies. Even if we assume that such cross-subsidies are anticompetitive, an assumption which may be improper, Utica Telephone avers that the two companies are operating the cell site pursuant to a

written agreement sharing the costs and revenues. Therefore, we find that Utica-Rome has failed to establish a case of anticompetitive practices contrary to the public interest. Finally, we find that there are no substantial or material questions of fact warranting further investigation. *See generally Astroline Communications Company Ltd. Partnership v. FCC*, 857 F.2d 1556, 1557 (D.C. Cir. 1988).

III. ENGINEERING DISCREPANCIES

A. Frequency Plan

7. Regarding both applications, Utica-Rome charges that Utica Telephone failed to include a frequency plan in violation of Section 22.913(a)(5) of the rules. In opposition, Utica Telephone avers that failure to include a frequency plan does not require dismissal of the applications. Moreover, Utica Telephone has filed an amendment for each application containing its frequency plan.

8. Section 22.913(a)(5), 47 C.F.R.§22.913(a)(5), requires that applications for a major modification to a cellular system must include a frequency plan. Omission of the frequency plan is a minor defect to a modification application which does not render the application unacceptable for filing because it is not essential to the processing of the application. This defect can be corrected by minor amendment pursuant to Section 22.918 of the rules. 47 C.F.R. §22.918. *See Jacksonville Cellular Telephone Corporation*, 3 FCC Rcd 5386 (1988)(applicant allowed to amend to submit frequency plan). Utica Telephone has done so and we will accept the amendment. We therefore reject Utica-Rome's allegations on this matter.

B. Old Forge Application

9. In addition, regarding Utica Telephone's application for the addition of a cell at Old Forge, File No. 04202-CL-MP-90, Utica-Rome alleges that Utica Telephone's plan to use two directionalized antennas is at odds with its response to item number 33(h) of its Schedule B, Form 401 (beamwidth will be 360^0, indicating that the two antennas would be omnidirectional), and that Utica Telephone fails to provide technical information on the distance of the two proposed antennas from the tower to which they are side-mounted, in violation of Section 22.15(j)(4) of the Rules.

10. In opposition, Utica Telephone points out that none of the listed discrepancies has resulted in the dismissal of an application for a major modification of a cellular system. With regard to the antenna beamwidth, Utica Telephone states that its response to question 33(h) should have been 60^0 and it has filed an amendment to correct the typographical error of 360^0. Finally, with regard to the alleged violation of Section 22.15(j)(4), Utica Telephone argues that the rule does not apply to its situation because the antenna radiation pattern is not affected by the mounting structure. Utica Telephone has also filed an affidavit from George L. Schrenk, stating that the size and orientation of the tower and distance of the antennas from the tower have no cognizable effect on the radiation pattern, and that this fact was stated on the application tower sketch in Utica Telephone's Schedule B of its Form 401.

11. First, Utica-Rome's argument that Utica Telephone violated §22.15(j)(4) is without foundation. Section 22.15 of the Rules, by its terms, does not apply to the cellular radio service. Second, with regard to Utica Telephone's erroneous response to question 33(h), we accept Utica Telephone's minor technical amendment to correct the error. It is well established that after an application has met our pre-lottery filing requirements, we have allowed minor discrepancies or clerical mistakes to be corrected by amendment. *See REM Communication*, 3 FCC Rcd 3705 (1988); *Data Cellular Systems*, 4 FCC Rcd 5345 (Com. Car. Bur. 1989), and *Werner, Burton K.*, 2 FCC Rcd 1484 (Com. Car. Bur. 1987). Therefore, Utica-Rome's petition to deny concerning this issue is denied.

C. Paris Application

12. With respect to Utica Telephone's application for an additional cell site near Paris, File No. 04288-CL-MP-90, Utica-Rome charges that Utica Telephone violated Section 22.902(d)(1) of the Rules because it did not coordinate frequency use with other authorized systems existing up to a distance of 75 miles. In addition, Utica-Rome argues that three of Utica Telephone's cardinal radials (N 0^0E, N 45^0E, and N 315^0E) propose radiated power levels above the height-power limits, and that Section 22.15(b)(1)(iii) requires coordination with other authorized carriers up to a distance of 125 miles for such facilities.

13. In response to its alleged failure to show that it coordinated with tentative selectees or pending applicants within 75 miles, Utica Telephone states that there were no such facilities existing or proposed at the time its application was filed. However, Utica Telephone has filed an amendment showing that it has coordinated with tentative selectees announced after it filed its application. With regard to the alleged violation of Section 22.15(b)(1)(iii), Utica Telephone points out that the rule on its face does not apply to the cellular radio service.

14. Utica Telephone has satisfactorily explained why it did not have to comply with the frequency coordination rule at the time it filed its application. In any event, the rules do not require that an applicant make an explicit statement in its application that it has complied with Section 22.902 of the Rules. However, we accept the amendment submitted by Utica Telephone showing frequency coordination with tentative selectees as being dispositive of this issue. In addition, we agree with Utica Telephone that Section 22.15(b)(1)(iii) by its terms does not apply to the cellular radio service. Accordingly, Utica-Rome's petition to deny is denied on these issues.

IV. RESPONSE TO QUESTION 14, FCC FORM 401

15. Question 14 on the FCC Form 401 asks "Has applicant or any party to this application had any FCC station license or permit revoked or had any application for permit, license or renewal denied by this Commission?" In both applications, Utica Telephone responded as follows:

> Applicant, Utica Telephone Company, has not had any FCC station license or permit revoked or any application for permit, license or renewal denied by the Commission.

> Certain parties with direct or indirect ownership interests in Applicant may have had applications dismissed or denied by the Commission for reasons not related to their character or to Applicant's basic qualifications. These parties continue to be fully qualified to be FCC licensees. Under these circumstances, in accordance with Commission directives in other common carrier mobile services application proceedings, it is Applicant's understanding that it is correct to respond to Item 14 in the negative.

Utica-Rome argues that this response means that one of Utica Telephone's owners may have had a license revoked or an application dismissed or denied.

16. We take this opportunity to clarify an apparent misconception on the part of Utica Telephone. If an application is found to be legally, technically, or financially unqualified for grant due to non-compliance with the Commission's rules, the application is dismissed as unacceptable for filing. For an application to be denied, it must have been the subject of a hearing regarding substantial and material issues of fact. Thus, when question 14 of the FCC Form 401 asks whether the applicant or parties to the applicant have had any applications denied or revoked, it is asking first, whether any party to applicant has had an application designated for hearing and if so, whether such applications have been denied after a hearing.

17. Accordingly, Both Utica Telephone's original response to Question 14, and its first amendment thereto, are insufficient. In particular, Utica Telephone's amended response that "[t]o the best of [its] knowledge none of the minority partners or their affiliates have had applications dismissed or denied by the Commission for reasons related to their character or to their basic qualifications" is inadequate. First, Question 14 requires a definitive answer, not an answer "to the best knowledge" of the applicant. Utica Telephone and its constituent parties must know whether or not any of their applications have ever been denied or revoked after having been designated for hearing. Second, the standard for designating such a hearing is any "substantial and material question of fact," not necessarily only "reasons related to their character or to their basic qualifications." In response to an information request, Utica Telephone filed a second amendment meeting the criteria discussed herein. It amended its response to Question 14 to "no." Accordingly, the issues raised by Utica-Rome are moot.

V. STRIKE PETITIONS

18. In its Oppositions, Utica Telephone argues that Utica-Rome's petitions to deny are strike pleadings, interposed solely for delay. Utica Telephone bases its position on its argument that Utica-Rome's pleadings raise specious arguments. Utica-Rome responds that it has standing and that it acts as a private attorney-general vis-a-vis its competitor. In addition, Utica-Rome filed, with its replies to Utica Telephone's oppositions, an affidavit from Mr. Duncan McCully, General Manager of Utica-Rome, stating that Utica-Rome "has not in the past, nor in the present proceeding, attempted to delay, obstruct, or in any way abuse the Commission's procedures. . . . [Utica-Rome] was earnestly attempting to clarify discrepancies in [Utica Telephone's applications]."

19. An applicant charging that another party has filed a strike petition "must make a strong showing that delay is the primary and substantial purpose behind a petition to deny." *Radio Carrollton*, 69 F.C.C.2d 1139, 1151 (1978). The primary factors considered in a determination of whether or not a particular pleading was interposed solely for delay are: (1) statements by principals or officers of the licensee admitting an obstructive purpose; (2) the withholding of information relevant to a determination of the issues raised; (3) the absence of any reasonable basis for the allegations raised in the petition to deny; (4) economic motivation indicating a delaying purpose;[5] and (5) other conduct of the licensee. *Id.*; *see also Viacom International*, 2 FCC Rcd 3259, 3260 (1987).

20. Utica Telephone has failed to demonstrate that the petitions to deny were strike petitions or petitions filed solely for the purpose of delay. Even if we assumed *arguendo*, an economic motivation to delay the proceeding, this alone would not establish a *prima facie* case of having filed the pleadings with the sole purpose of delaying the proceeding. Accordingly, we reject Utica Telephone's allegation that the petitions in this case were strike petitions. However, some of Utica-Rome's arguments are frivolous. We caution all parties to avoid filing petitions and other pleadings which contain arguments having little or no factual or legal basis.

VI. CONCLUSION AND ORDERING PARAGRAPHS

21. For the foregoing reasons, we find that grant of the applications is in the public interest.

22. WHEREFORE, IT IS ORDERED that the applications of Utica Telephone Company, File Nos. 04202-CL-MP-90 and 04288-CL-MP-90, ARE HEREBY GRANTED as conditioned herein. Construction is not authorized at any location for which a final Federal Aviation Administration determination has not been submitted to the Commission and any required marking and lighting specifications have not been issued by the Commission. The authorization is conditioned upon Utica Telephone Company coordinating with current and future licensees in adjacent markets and upon providing interference-free operations to licensees in other areas.

23. IT IS FURTHER ORDERED that the petitions to deny filed by Utica-Rome Cellular Partnership ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Utica-Rome's Motion for Acceptance of Pleading Nunc Pro Tunc with regard to File No. 04202-CL-MP-90 is granted. The pleading was served on the applicant on the due date and filed with the Commission, albeit late, at the next available opportunity and the petitioner has satisfactorily explained the reasons for the delay.

[2] According to Utica-Rome, Utica Telephone's application reveals that it and Syracuse Telephone are commonly owned and that there is a contractual agreement between them for the joint operation of the overlapping cell site.

[3] Section 22.903(a) states in pertinent part: "No CGSA . . . may extend beyond the boundaries of the MSA . . . except where any such extensions are *de minimis* and do not include areas within another central MSA . . ." *See also* Procedures Update, 52 Rad. Reg. 2d (P&F) 725, 726 (Public Notice November 1, 1982), *aff'd*, Cellular Radio Service, 56 Rad. Reg. 2d (P&F) 1583 (1984): "[M]inor overlap of 39 dBu contours. . . into another central SMSA will not render an application defective, provided that the application includes a specific explanation of why it was necessary to engineer the particular cell(s) such that the 39 dBu contours could not be kept entirely within the SMSA (or NECMA). . . ." Utica Telephone's 39 dBu contour extensions are unopposed, and in both captioned applications the proposed extensions meet our criteria for grant. *See* Saco River Cellular Telephone Company, 62 Rad. Reg. 2d (P&F) 999, 1000 (Mob. Serv. Div. 1987); *see also* Bell Atlantic Mobile Systems of Philadelphia, 2 FCC Rcd 7531 (1987).

[4] The licensee in the adjoining market may not use the extension area in the other market to meet its own 75% coverage requirement. *Cf. Petroleum Communications, Inc.*, 2 FCC Rcd 3695 (1987) (even the most generous CGSA extension permitted to cellular licensees has not involved placing transmitters outside their MSA); *Petroleum Communications, Inc.*, 4 FCC Rcd 4085, 4088, n. 8 (Com. Car. Bur. 1989) (excursions of CGSA past the boundary line of the MSA are not authorized); *GTE Mobilnet of South Texas*, 4 FCC Rcd 1657 (Mob. Serv. Div. 1989)(no interference protection in extension areas).

[5] However, the "'mere existence of an ulterior economic motive in filing pleadings with' the Commission is not sufficient, without more, to establish an abuse of process." Radio Carrollton, 69 F.C.C.2d at 1151, n.25, citing Gill Industries, 56 F.C.C.2d 765, 769 (1975).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:

Petition for Rule Making on behalf of: RM-6911
Chouteau Telephone Company
Cunningham Telephone Co., Inc.
H & B Communications, Inc.
The Moundridge Telephone Company
Totah Telephone Company, Inc.
Twin Valley Telephone, Inc.
Wamego Telephone Co., Inc.
Wilson Telephone Co., Inc.

MEMORANDUM OPINION AND ORDER

Adopted: April 18, 1990; Released: May 1, 1990

By the Commission:

I. INTRODUCTION

1. On July 20, 1989, Fred Williamson and Associates, Inc., on behalf of eight telephone companies[1] (petitioners), filed a petition with this Commission to initiate a Rule Making proceeding to amend Part 32 accounting requirements that apply to computer software.[2] In the alternative, the petitioners request a specific clarification of the accounting requirements as they apply to software costs incurred in connection with upgrades or modification of digital technology central office equipment. For the reasons discussed in the succeeding paragraphs, we deny the petitioners' request for Rule Making, and provide the additional clarification contained herein.

II. BACKGROUND

2. The Uniform System of Accounts for telecommunications common carriers prescribed in Part 32 of this Commission's rules and regulations requires common carriers to capitalize the original cost of initial operating system software in the same asset account used to record the cost of associated hardware (computers). In the text of the Report and Order adopting Part 32, we indicated that subsequent additions or modifications should be expensed in the year of purchase, rather than capitalized, and then depreciated, with associated hardware. [3] The discussion in the text of the *Report and Order* acknowledged that there might be exceptional circumstances that would warrant a departure from the prescribed practice; but aside from a reference to distortions of reported financial results of operations, the *Report and Order* did not describe what might constitute a distortion or describe what other circumstances might qualify as "exceptional."[4]

3. Before Part 32 went into effect on January 1, 1988, replacing the system of accounts in Part 31, the Commission's accounting rules for telecommunications common carriers were silent on accounting for computer software. In this environment, carriers developed inconsistent accounting practices regarding computer software costs, with some carriers recording such costs in capital accounts and others recording such costs in expense accounts. But according to the record developed in the process of adopting Part 32, most large companies were following practices that resulted in expensing of computer software in the year of acquisition.

III. SUMMARY OF PETITION

4. The petitioners, all of whom serve substantially less than 50,000 access lines, request that the Commission amend its rules to give smaller carriers additional flexibility to capitalize the cost of computer software upgrades. The petitioners note that Part 32 requires costs associated with subsequent upgrades and modifications of initial operating system software to be expensed.[5] They claim that new services and features such as Signaling System 7 (SS7) and Integrated Services Digital Networks (ISDN), among others, will force major changes in existing digital central office switching hardware if smaller carriers are to continue to participate as active interfaces in network modifications and new service offerings to their customers.[6] They claim that tentative price quotations from digital switch manufacturers for the necessary software for future network systems such as SS7 alone could require software upgrades and modifications costing even the smallest carriers $100,000 or more. The petitioners characterize such costs as major costs.[7]

5. The petitioners allege that expensing procedures required by our rules result in distortions in reported results of operations and do not match the year costs are recognized for ratemaking purposes with the periods of their usefulness to public service. The petitioners hold that requiring the software costs to be expensed in the year of acquisition forces current ratepayers to bear the entire burden of these costs when, in fact, the software will also be providing its benefits to future ratepayers. They believe that capitalization and depreciation would more closely follow customer benefit relationships in current and future periods.[8]

6. The petitioners state that expensing computer software costs for upgrades and modifications presents a particular problem for small telephone companies that file their interstate access tariffs biannually in accordance with Part 61 of the Commission's rules.[9] Under the existing procedures, the petitioners claim, it would take companies who avail themselves of these procedures up to two years to recover their costs through the tariff review process. The petitioners also believe Rural Electrification Administration (REA) loan qualifications could be adversely affected if small companies are required to expense these software upgrade and modification costs. Capitalization of the costs in question, as opposed to expensing, assists in meeting net worth requirements and calculations of the ability of borrowers to pay interest on loans.[10] The petitioners also believe expensing understates the interstate rate base and may change jurisdictional revenue requirement allocations.[11]

7. Finally, the petitioners allege that expensing could force small carriers into uneconomical decisions. Faced with having to expense software upgrades in connection with otherwise economical options to reuse owned equipment or purchase second hand equipment, they might

decide to acquire new hardware having initial operating systems that can be capitalized and expensed as depreciation over the life of the associated hardware.[12]

IV. SUMMARY OF COMMENTS

8. Interested parties were invited to file comments on or before September 1, 1989 with reply comments due on or before September 18, 1989. Comments were filed by the Ameritech Operating Companies[13] (Ameritech); Associated Communications & Research Services, Inc. on behalf of certain companies[14] (Associated Communications); the Bell Atlantic Telephone Companies[15] (Bell Atlantic); BellSouth Corporation, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company (BellSouth); Central Telephone Company (Centel); Kiesling Associates; MCI Telecommunications Corporation (MCI); The National Telephone Cooperative Association (NTCA); Pacific Bell and Nevada Bell (Pactel); The United States Telephone Association (USTA); and The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (U S West). Reply comments were filed by the petitioners and MCI.

9. Ameritech, Bell Atlantic, BellSouth, Centel, Pactel, U S West, and USTA believe no Rule Making is necessary.[16] These parties believe the current requirements are sound and that it is clear from the text of the *Report and Order* adopting Part 32 and the interpretation issued in RAO-7 that there might be exceptional circumstances under which capitalization of subsequent software upgrades and modifications might be appropriate.[17] MCI believes the petitioners have identified problems unique to small carriers, but in reply comments concludes that small telephone companies should be awarded relief through waivers of this Commission's rules.[18] NTCA also notes that this Commission recognized in adopting Part 32 that where there is a material impact on reported financial results, expensing would not be appropriate. As a result, NTCA believes a simple restatement of an interpretation should be adequate to address the petitioners' concerns and a Rule Making should not be necessary.[19] Associated Communications and Kiesling Associates believe that companies should be allowed (or permitted) to capitalize software costs when the software meets GAAP criteria for an asset.[20] In Reply Comments, the petitioners themselves indicate a Rule Making may not be necessary. However, they strongly urge this Commission to define the term "exceptional circumstances," and caution that when large numbers of similarly situated companies meet those circumstances, they do not fit the term "exceptional".[21]

10. Ameritech, BellSouth, Centel, Pactel, U S West, and USTA believe no clarification is necessary.[22] Ameritech, BellSouth, and USTA argue that the text of the *Report and Order* and RAO-7 already provides the needed flexibility to capitalize.[23] Bell Atlantic, however, believes we should clarify that the existing rules already provide the petitioners the relief they seek.[24] U S West apparently believes a waiver request would be required, but notes that the petitioners offer no information on their individual circumstances and the impact of the current software accounting rules on their respective companies. As such, U S West argues, it would be inappropriate to grant a waiver on the basis of information provided in the petitioners' filing.[25]

11. No other party objects to this Commission granting the petitioners relief in the circumstances they describe, but BellSouth notes that the current rules do not treat acquisitions of new or used switching equipment differently. If an "exceptional circumstances" test is met, software upgrades and modifications can be capitalized whether the equipment is new or used and reported interstate rate base results would not be affected. Further, BellSouth believes the appropriate method for overcoming the recovery lag problem the petitioners describe (*see* para. 6, *supra)* is through a proforma adjustment to historical results and inclusion of the higher expense level in tariffed rates. BellSouth notes that if the petitioners can recover the costs in question in the effective rate period, long term financing should not be required.[26]

V. DISCUSSION

12. We agree with the general consensus among the commenting parties that a Rule Making proceeding is not required. Several of the commenting parties point to the record in the CC Docket 78-196 and indicate that our adoption of Section 32.2000(i), which requires only the capitalization of initial operating system software, did little to change a common practice already followed by the larger carriers.[27] When we adopted the current rules in the interests of uniformity, considerable weight was given to the generally accepted accounting principle of consistency. We believed it would have been a violation of the consistency principle for most of the carriers we regulate if we were to revise the prevailing practice and adopt a capitalization policy for subsequent modification and upgrades. For the carriers we regulate directly, software upgrades, modifications, and enhancements are ongoing programs and can, with few exceptions, be scheduled to avoid the large one-time expense "spikes" that are the main concern of the petitioners. In the absence of such expense "spikes", the issue of matching costs to the period benefited loses a great deal of its relevance and does not warrant a departure from a previously established and consistently applied practice.

13. We recognized, however, that there might be a problem for some carriers, particularly the smaller companies who are directly or indirectly subject to our accounting rules.[28] For some carriers, upgrades, modifications and additions occur with less frequency and the dollar amounts involved can have a greater impact on financial results. When year to year comparisons are made, this can result in the expense "spikes" the petitioners describe. In cases where an application of our rules would result in material distortions that do not result in an accurate matching of costs with the periods benefited, additional GAAP criteria could be applied that would result in a logical decision to capitalize the acquisition. In a typical case, we would expect the acquisition to (1) extend the useful life of the asset or (2) increase the quantity and/or quality of services provided by the asset in future periods; and (3) result in a material distortion if charged to expense in the year of acquisition as required by Section 32.2000(i). If either of the first two conditions coupled with the third are met, capitalization of the ac-

quisition would be a logical decision that can be accomplished within the framework of existing guidance in RAO-7.

14. We also take this opportunity to correct an apparent misunderstanding of the petitioners with respect to the reuse of owned equipment or the purchase of used equipment. If upgrades of owned equipment meet the test described in the preceding paragraph, capitalization would be permitted. Also, when used equipment is purchased and modification or upgrade of software is required to meet operational needs, the software upgrade or modification would qualify as initial operating system software for capitalization purposes. Thus, the concerns the petitioners express with respect to reuse of owned equipment and the purchase of used equipment are unfounded.

15. We believe Part 32, the existing guidance provided in RAO-7, and the additional guidance provided in the preceding paragraphs are more than adequate to address petitioner concerns regarding potential financial distortions caused by expensing computer software upgrades. Carriers who are fully subject to our rules should request an interpretation if there is some question as to whether a particular acquisition meets the criteria. Carriers who are not fully subject to our rules, but are subject to our accounting rules because of requirements imposed by other governmental units having jurisdictional authority over them should use the criteria described in the preceding paragraphs in raising capitalization/expense issues with those authorities.[29]

VI. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED THAT the petitioners' request for Rule Making IS DENIED; and

17. IT IS ORDERED THAT the petitioners' request for clarification IS GRANTED, to the extent discussed herein.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Chouteau Telephone Company; Cunningham Telephone Co., Inc.; H & B Communications, Inc.; The Moundridge Telephone Company; Totah Telephone Company, Inc.; Twin Valley Telephone, Inc.; Wamego Telephone Co., Inc.; and Wilson Telephone Co., Inc.

[2] Software consists of computer programs that set out a sequence of instructions for a computer to execute.

[3] Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies, FCC 86-221 (released May 15, 1986) (para. 131 - 132) (*USOA Order*), *recon. denied in part and granted in part*, 2 FCC Rcd 1086 (1987).

[4] *Id.* Also, on July 1, 1987, the Accounting and Audits Division, in accordance with Section 0.291 of the Commission's rules, issued Responsible Accounting Officer Letter No. 7 (RAO-7), which attempted to clarify several aspects of Part 32. Question No. 8 of the letter attempted to clarify the expense/capitalization policy for software for network operations. In addressing this issue, RAO-7 explained that initial operating system software should be capitalized. The letter also stated that the disposition of all other software should be determined by management and should be in conformance with Generally Accepted Accounting Principles (GAAP) at the time such determination is made.

[5] Petition at 3.

[6] *Id.* at 4.

[7] *Id.*

[8] *Id.* at 5.

[9] 47 C.F.R. Part 61.

[10] Petition at 5-6. If the acquisition is capitalized, net worth (assets less liabilities) is higher at the close of the period in which the acquisition is made than if the acquisition is expensed. In interest coverage calculations, net income before interest and taxes is higher under capitalization than under expensing. An expensed acquisition reduces net income by the full amount of the acquisition, while a capitalized acquisition reduces net income by the amount of depreciation taken during the year, which reflects only a portion of the full acquisition cost. This results in a more favorable times-interest-earned ratio.

[11] *Id.* at 6. (*See also* note 29, *infra.*).

[12] *Id.* at 4-5.

[13] Illinois Bell Telephone Company; Indiana Bell Telephone Company, Incorporated; Michigan Bell Telephone Company; The Ohio Bell Telephone Company and Wisconsin Bell, Inc.

[14] Atlas Telephone Company, Inc.; Central Oklahoma Telephone Company, Inc.; Cherokee Telephone Company, Inc.; Grand Telephone Company, Inc.; Hinton Telephone Company, Inc.; Panhandle Telepone Cooperative, Inc.; Oklahoma Telephone Company, Inc.; and Terral Telephone Company, Inc.

[15] The Bell Telephone Company of Pennsylvania; the four Chesapeake and Potomac Telephone Companies; The Diamond State Telephone Company; and New Jersey Bell Telephone Company.

[16] Ameritech Comments at 7, Bell Atlantic Comments at 1, BellSouth Comments at 8, Centel Comments at 5, Pactel Comments at 6, U S West Comments at 7, USTA Comments at 4.

[17] Ameritech Comments at 4-5, Bell Atlantic Comments at 2, BellSouth Comments at 3-5, Centel Comments at 2, Pactel Comments at 3-4, U S West Comments at 5-6, USTA Comments at 3.

[18] MCI Reply Comments at 6.

[19] NTCA Comments at 2.

[20] Keisling and Associates letter, dated August 29, 1989, and Associated Communications Comments at 2.

[21] Petitioners' Reply Comments at 1-2.

[22] Ameritech Comments at 7, BellSouth Comments at 4, Centel Comments at 4, Pactel Comments at 3, U S West Comments at 4-5, USTA Comments at 4.

[23] Ameritech Comments at 7, BellSouth Comments at 4, USTA Comments at 2.

[24] Bell Atlantic Comments at 1.

[25] U S West Comments at 6.

[26] BellSouth Comments at 5-7.

[27] *See* Ameritech Comments at 3 and BellSouth Comments at 4. BellSouth states that, in its case, Part 32 resulted in an increase rather than decrease in capitalized amounts.

[28] Many small carriers are subject to our accounting rules because state and local jurisdictions require compliance.

[29] We are not unsympathetic to the other matters raised by the petitioners with respect to a carrier's ability to meet loan qualifications and jurisdictional rate base issues. The additional clarification we provide here, to the extent it further describes circumstances when capitalization would be appropriate, should ease the concerns expressed by the petitioners.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-141

In the Matter of

Amendment of Section 73.202(b),	RM-6030
Table of Allotments,	RM-6407
FM Broadcast Stations.	
(Spring Grove and Preston,	
Minnesota and Mason City, Iowa)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 6, 1990; Released: May 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration[1] filed by KFIL, Inc. (KFIL), of the *Report and Order*, 4 FCC Rcd 5738 (1989), allotting Channel 252C2 to Spring Grove, Minnesota, and Channel 250A to Mason City, Iowa.

2. KFIL petitioned the Commission to reconsider the allotment of Channel 252C2 at Spring Grove, Minnesota, and the rejection of its mutually exclusive counterproposal. In particular, KFIL requested the substitution of Channel 252C2 for Channel 276A at Preston, Minnesota, and modification of the license of Station KFIL-FM to specify operation on Channel 252C2. KFIL has filed comments requesting the withdrawal and dismissal of its Petition for Reconsideration.

3. In view of the foregoing, IT IS ORDERED, That the Petition of KFIL, Inc., IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy & Rules Division
Mass Media Bureau

FOOTNOTE

[1] Public Notice was given September 14, 1989, Report No. 1795.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal Nos. 2161
Revisions to Tariff F.C.C. No. 12 and 2164

Custom-Designed Integrated Services

ORDER

Adopted: April 24, 1990; Released: April 25, 1990

By the Chief, Common Carrier Bureau:

1. By the captioned transmittals, AT&T Communications (AT&T) establishes Virtual Telecommunications Network Service (VTNS) Options 35 and 36, arrangements serving the United States, Puerto Rico, the U.S. Virgin Islands and specific international locations. VTNS Options 35 and 36 were successively filed on March 12 and March 14, 1990, to become effective April 26 and April 28, 1990. US Sprint Communications Company Limited Partnership (Sprint) filed a joint petition to reject or suspend the two VTNS filings March 27, 1990. AT&T replied April 6, 1990.

2. Under VTNS Option 35, the minimum annual charge of $5.22 million is based on the provision of VTNS for an initial three-year period, with the initial service configuration including 389 Measured Ports, 248 Rate Option 1 Measured Remote Ports, and 133 Rate Option 2 Measured Remote Ports. Data Transmission Capabilities provided under Option 35 include 280 access components at 9.6 kbps, 18 access components at 1.5 Mbps, and 159 network components at 9.6 kbps. These service elements may not be decreased below 80 percent of the initial number without specific agreement between the carrier and customer. The arrangement also provides volume discounts for both domestic and international measured charges.

3. The initial configuration for Option 36 includes 3642 Measured Ports, 600 Rate Option 2 Measured Remote Ports, 3 Rate Option 1 Measured Remote Ports, and various quantities of Voice Transmission Capabilities (VTC) and DTC access and network components. The minimum charge for the five-year term is $132.63 million. The quantity of various service elements specified for the initial configuration is subject to minimum requirements. Option 36 also includes volume discounts for domestic and international measured charges, and establishes an interruption credit for domestic 1.5 Mbps service that is similar to reliability assurances accorded ACCUNET 1.5Mbps customers.

4. In its petition, Sprint objects that these VTNS options discriminate unjustly, because, in contrast to the VTNS arrangements investigated and considered by the Commission's *April 18 Order*,[1] the carrier has not demonstrated that these integrated service packages are unlike its other, component services. If, nonetheless, these two options are considered unlike AT&T's counterpart component offerings, Sprint iterates, as VTNS offerings they are deemed like one another under the *April 18 Order*, but rates for the individual options vary without justification and are therefore discriminatory. Sprint Petition at 1-3. In addition, Sprint contends, these options are effectively restricted by the specificity to the customers for which they are designed, and their proliferation of VTNS options supports this inference. Sprint argues that the Commission should require AT&T to file an integrated offering for VTNS service, and asserts that the individualized ratemaking applied by AT&T to VTNS options conflicts with the Commission's determination to require that local exchange carriers abandon individual case basis (ICB) ratemaking for DS3 services in favor of averaged, generic rates. Sprint also states generally that the cost support for these options is deficient. *Id.* at 3-5.

5. AT&T replies that Sprint's petitions reiterate arguments raised in previous Tariff 12 proceedings, and there found without merit. AT&T Reply at 1-3. AT&T asserts that differences in rates between the VTNS options and its general offerings are not unreasonably discriminatory because the Commission has held integrated service packages to be unlike those component services, and therefore outside the scope of the prohibition of discrimination between like services established in the Communications Act. *Id.* at 3-4. As to assertions of discrimination between the rates in Options 35 and 36, AT&T contends, comparisons between single rate elements employed as part of VTNS arrangements are meaningless. According to AT&T, the failure to consider all aspects of the configuration affecting application of rates precludes a determination of which option is more favorable when viewed as an overall, integrated service. *Id.* at 5-6. AT&T asserts the Commission's determination respecting ICB rates for DS3 arrangements is inapposite because those arrangements were concededly "like" services, offered at disparate rates. AT&T notes that no customer has complained of being refused VTNS service, whether under an existing or modified option, and asserts the cost support materials submitted with these options satisfies the Commission's requirements. *Id.* at 6-9.

6. The Common Carrier Bureau has reviewed AT&T's Transmittal Nos. 2161 and 2164, the petitioner's assertions, and related pleadings. We conclude that no compelling argument has been presented that the tariffs are so patently unlawful as to warrrant rejection, and that an investigation is not warranted at this time.

7. Accordingly, IT IS ORDERED that the petition to reject, suspend, or investigate American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 2161 and 2164, filed by US Sprint Communications Company Limited Partnership, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] AT&T Communications, Revisions to Tariff F.C.C. No. 12, CC Docket No. 87-568, Memorandum Opinion and Order, 4 FCC Rcd 4932 (1989) (*April 18* Order), recon. denied, 4 FCC Rcd 7928 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN SATELLITE COMPANY d/b/a CONTEL ASC — Transmittal No. 54

Revisions to Tariff F.C.C. No. 4

Domestic Communications Service

ORDER

Adopted: April 25, 1990; Released: April 25, 1990

By the Deputy Chief, Common Carrier Bureau:

1. On April 12, 1990, Contel ASC (Contel) filed Transmittal No. 54 to introduce corrections to its Tariff F.C.C. No. 4, Domestic Communications Service. Through the instant transmittal, Contel amends the termination liability charge for disconnection of service between Creve Coeur, Missouri, Ft. Worth, Texas, San Diego, California, Pomona, California, Groton, Connecticut, and Detroit, Michigan to read "$11,621,640" rather than the "$7,966,230" figure currently listed. Contel also adds regulations requiring 180 days' written notice for termination of the above service. On April 19, 1990, General Dynamics Corporation (GD) filed a petition to reject or suspend and investigate Contel's tariff revisions. Contel submitted a reply on April 24. Transmittal 54 is scheduled to become effective April 26, 1990.

2. GD states that on February 14, 1990, it notified Contel of its intention to terminate service effective June 30, 1990. According to GD, the Contel tariff presently on file requires customers to provide 30 days' written notice prior to termination of service. Furthermore, GD explains that the current tariff specifies a $7,966.230 liability charge, reduced by a formula for each month of service, for termination occurring between the 20th and 54th month of service. GD maintains that Contel's tariff does not specify any liability for termination occurring at other times during the service period. Termination of GD's agreement with Contel would occur at the end of the 61st month of service. *Id.* at 2.

3. GD alleges that Contel's provisions retroactively and significantly alter the notice and termination liability terms upon which it relied when providing written notification of its intention to terminate service. It also argues that Contel's tariff revisions are unreasonable as applied to it because Contel fails to provide any rationale in Transmittal 54 to justify the changes. Furthermore, GD contends that Contel's revisions are inherently unreasonable since they are directed exclusively at GD. *Id.* at 4. Thus, GD asks the Commission either to reject Contel's transmittal, initiate an investigation into the revisions, or require Contel to refile the revisions accompanied by a "clear statement that the revisions to the tariff terms or rates do not apply retroactively to customers." *Id.* at 5.

4. Contel argues in response that the termination liability and notice provisions set forth in Transmittal 54 are identical to the contract provisions to which GD agreed at the time it took service. Contel maintains that the purpose of Transmittal 54 is merely to conform the tariff to the contract previously accepted by GD. It asserts that GD should not be permitted to use the tariff review process to breach its contractual obligations. Contel Reply at 2-3.

5. The Common Carrier Bureau has reviewed Contel's tariff transmittal and the various pleadings. We conclude that no compelling argument has been presented that Transmittal 54 is patently unlawful so as to require rejection, and that no question has been presented that warrants investigation at this time.

6. Accordingly, IT IS ORDERED, that the petition to reject or, in the alternative, suspend and investigate Contel ASC Tariff F.C.C. No. 4, Transmittal No. 54, filed by General Dynamics Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Bureau Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION,
Complainant,

v. File Nos. E-89-185

ILLINOIS BELL TELEPHONE COMPANY,
INDIANA BELL TELEPHONE COMPANY, INC.,
MICHIGAN BELL TELEPHONE COMPANY,
THE OHIO BELL TELEPHONE COMPANY,
and WISCONSIN BELL, INC.,

THE BELL ATLANTIC TELEPHONE COMPANIES, E-89-186

NEW YORK TELEPHONE COMPANY, E-89-187

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, E-89-188

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, E-89-189

SOUTH CENTRAL BELL TELEPHONE COMPANY, E-89-190

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, E-89-191

NORTHWESTERN BELL TELEPHONE COMPANY, and E-89-192

PACIFIC NORTHWEST BELL TELEPHONE COMPANY, E-89-193
Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: April 17, 1990; Released: May 1, 1990

By the Commission:

1. On May 16, 1989, MCI Telecommunications Corporation (MCI) filed a series of related complaints against the above-named local exchange carriers (hereinafter referred to collectively as the LECs). MCI requests that the Commission declare unlawful charges levied by each carrier for interstate access services from January 1, 1987, through December 31, 1987, to the extent those charges resulted in earnings in excess of the carrier's authorized rate of return for that period.[1] The LECs filed responsive pleadings, including motions to dismiss, and MCI replied. For the reasons discussed below, we grant the motions to the extent indicated herein and dismiss the complaints without prejudice.

2. One of the arguments advanced in several of the motions to dismiss is that Commission policy requires a two-year review period.[2] Therefore, the LECs conclude, MCI's allegations that the rates were unreasonable because they exceeded the prescribed target for a one-year period fail to state a cause of action. In this regard, MCI argues that the two-year prescription period established by the Commission relates only to the Commission's own decision regarding rates, but does not affect claims for damages filed pursuant to Section 208 of the Act. 47 U.S.C. § 208. It maintains that the carriers' rates were unlawful from their inception and thus the claim is ripe for decision.

3. The Commission recently reiterated that, in the case of a Section 208 complaint, a LEC's rate of return should be examined over the relevant monitoring period established in CC Docket No. 84-800 [3] (in this instance 1987-1988). It dismissed two complaints which limited to one year the period in which to determine a carrier's earned rate of return. The Commission noted that the complainant, MCI, had failed to provide sufficient justification to support deviation from the existing Commission policy of examining rates in relation to the two-year monitoring period. *MCI Telecommunications Corporation v. Southern Bell Telephone and Telegraph Company*, 4 FCC Rcd 8135 (1989) (*MCI v. Southern Bell), recon. den.*, _____ FCC Rcd _____ (released March _____, 1990). Likewise, MCI has here limited the period in which to determine a carrier's earned rate of return to one year (or less) and has provided no persuasive reason why, in the particular circumstances presented by these complaints, we should deviate from examining rates in relation to the entire monitoring period.[4] Accordingly, we are dismissing the complaints without prejudice.[5]

4. Accordingly, IT IS ORDERED that the above-listed complaints (File Nos. E-89-185 through E-89-193) filed by MCI Telecommunications Corporation on May 16, 1989, ARE DISMISSED WITHOUT PREJUDICE.

5. IT IS FURTHER ORDERED that the motion to dismiss filed by each of the above-listed defendants IS GRANTED to the extent indicated above.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The complaint against Southern Bell (File No. E-89-189) covers only the period April 1, 1987 through December 31, 1987.

[2] It is unnecessary to summarize all of the arguments advanced in these pleadings or to resolve the other issues raised by the parties, given our disposition of MCI's complaints. We note

that issues raised by defendants in these complaints, such as whether the Commission may award damages when it is the carrier's earned return for an individual service category rather than its overall return which exceeds the allowed rate of return, have been raised in a number of other complaints filed by MCI. Many of these arguments have been addressed in our decisions resolving those other complaints. *See, e.g.*, MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co., 5 FCC Rcd 216 (1990), *pet for recon. pending.*

[3] Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, Phase I, FCC 85-527, 50 Fed. Reg. 41350 (Oct. 10, 1985)(*Phase I Order), recon.*, FCC 86-114 (released Mar. 24, 1986), *summarized in* 51 Fed. Reg. 11033 (Apr. 1, 1986).

[4] As in *MCI v. Southern Bell, supra* para.3, MCI offers only general arguments why the Commission might have chosen to adopt a one year review period in CC Docket No. 84-800, instead of the two year period it selected.

[5] MCI is not prejudiced by this result. The statute of limitations will not bar full recovery of any damages MCI might have sustained as a result of the carriers' charges. *MCI v. Southern Bell, supra*. For purposes of Section 415 of the Communications Act, 47 U.S.C. § 415, discovery of the "right or wrong" or of the facts on which such knowledge is chargeable in law occurs in this instance when defendant files its rate of return monitoring report for the two-year monitoring period. The carriers have only recently filed their final monitoring reports for the 1987-1988 period, and the information contained therein may be the subject of future complaints by MCI.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-372

In the Matter of

Amendment of Section 73.202(b), RM-6907
Table of Allotments,
FM Broadcast Stations.
(Clarksdale, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 16, 1990; Released: May 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 6649 (1989), issued in response to a petition filed by WKDJ Radio (petitioner), proposing the substitution of FM Channel 243C3 for Channel 243A at Clarksdale, Mississippi. Petitioner also requested modification of its construction permit for Channel 243A to specify the higher class channel. Petitioner filed comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 243C3 for Channel 243A at Clarksdale, Mississippi, since it could provide the community with its first wide coverage FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site.[1] In addition, we have authorized a modification of the petitioner's construction permit for Channel 243A, Clarksdale, Mississippi, to specify operation on Channel 243C3, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 14, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Clarksdale, Mississippi	243C3, 269A, 292A

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Channel 243A, Clarksdale, Mississippi, IS MODIFIED TO SPECIFY operation on Channel 243C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 243C3 at Clarksdale are 34-06-00 and 90-25-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-409

In the Matter of

Amendment of Section 73.202(b), RM-6693
Table of Allotments,
FM Broadcast Stations.
(Linden, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 17, 1990 **Released: May 1, 1990**

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 7030 (1989), proposing the substitution of Channel 253C1 for Channel 253C2 at Linden, Alabama, and modification of the license of Marengo County Broadcasting, Inc. (petitioner) for Station WDAL(FM), to specify operation on the higher powered channel.[1] Petitioner filed supporting comments. No other comments were received.

2. As stated in the *Notice*, Channel 253C1 can be allotted to Linden at the petitioner's specified site,[2] consistent with the minimum distance separation requirements of the Commission's Rules.

3. The Commission believes the public interest would be served by substituting Channel 253C1 for Channel 253C2 at Linden, since it could provide a wider coverage FM service. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station WDAL(FM) to specify operation on Channel 253C1 in lieu of Channel 253C2 at Linden, Alabama.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 14, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Linden, Alabama	253C1, 275C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Marengo County Broadcasting, Inc. for Station WDAL(FM) (BLH-880329KA), IS MODIFIED effective **June 14, 1990,** to specify operation on Channel 253C1 in lieu of Channel 253C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] As indicated in the *Notice*, Channel 253C2 was substituted for Channel 296A in MM Docket No. 87-451, and the license of Marengo County modified accordingly. *See* 3 FCC Rcd 6849 (1988).

[2] Coordinates at the petitioner's specified site for Channel 253C1 at Linden are 32-10-00 and 87-40-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-232

In the Matter of

Amendment of Section 73.202(b),	RM-7223
Table of Allotments,	
FM Broadcast Stations.	
(Dickinson, North Dakota)	

NOTICE OF PROPOSED RULE MAKING

Adopted: April 20, 1990; Released: May 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Dickinson Broadcasting Corporation (petitioner), requesting the allotment of Channel 256C1 to Dickinson, North Dakota, as the community's second local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Channel 256C1 can be allotted to Dickinson in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence in the allotment is required since Dickinson is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 256C1 to Dickinson, North Dakota, since it could provide the community with its second local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Dickinson, North Dakota	221C3[2]	221C3, 256C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 21, 1990,** and reply comments on or before **July 6, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

June D. Deck, President
Dickinson Broadcasting Corporation
119 Second Avenue, West
Dickinson, North Dakota 58601
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for this allotment are North Latitude 46-52-48 and West Longitude 102-47-18.

[2] The Commission, on its own motion, recently substituted Channel 221C3 for Channel 221A at Dickinson and modified the license of Station KRRB to specify operation on the higher powered channel. *See,* 5 FCC Rcd 2152 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-231

In the Matter of

Amendment of Section 73.202(b), RM-7294
Table of Allotments,
FM Broadcast Stations.
(Bismarck, North Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 20, 1990; Released: May 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by J B Broadcasting (petitioner), requesting the allotment of Channel 268A to Bismarck, North Dakota, as the community's fifth local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Channel 268A can be allotted to Bismarck in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence is required since Bismarck is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 268A to Bismarck, North Dakota, since it could provide the community with its fifth local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Bismarck, North Dakota	225C, 233C, 243C, 254C	225C, 233C, 243C, 254C, 268A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 21, 1990,** and reply comments on or before **July 6, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Barbara A. Kelly
J B Broadcasting
23 Brookwood Court
Princeton, New Jersey 08540
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are North Latitude 46-48-24 and West Longitude 100-46-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-542

In the Matter of

Amendment of Section 73.202(b), RM-6695
Table of Allotments,
FM Broadcast Stations.
(Monroeville, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 13, 1990; Released: May 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 4 FCC Rcd 8415 (1989), issued in response to a petition filed on behalf of Monroe Broadcasting Company, licensee of Station WMFC-FM, Channel 257A, Monroeville, Alabama, proposing the substitution of Channel 257C2 for Channel 257A and modification of its license to specify operation on the higher powered channel. Petitioner filed comments in support of the proposal. No other comments were received.

2. As stated in the *Notice*, Channel 257C2 can be allotted to Monroeville at the petitioner's present site,[1] consistent with the minimum distance separation requirements of the Commission's Rules. The minimum distance separation requirements are met based upon the issuance of a construction permit to Station WKSM(FM), Fort Walton Beach, Florida, on Channel 258C2 (BPH-880106IC) at coordinates 30-24-51 and 86-37-40, and on the basis of action taken in MM Docket No. 88-318 modifying Station WSLY(FM), York, Alabama, to specify operation on Channel 285C2. Issuance of a construction permit for the Monroeville upgrade may be delayed pending licensing of either station.

3. On the basis of the above, the Commission believes the public interest would be served by substituting Channel 257C2 for Channel 257A at Monroeville, since it could provide the community and the surrounding area with expanded radio service. Therefore, and in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the license of Station WMFC-FM to specify operation on Channel 257C2 in lieu of Channel 257A at Monroeville, Alabama, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 14, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Monroeville, Alabama	257C2

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Monroe Broadcasting Company for Station WMFC-FM, IS MODIFIED effective **June 14, 1990,** to specify operation on Channel 257C2 in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND a copy of this *Order* by CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Grantell Broadcasting Company, Radio Station WSLY(FM), Route 1, Box 400B, York, AL 36925, and to Specter Broadcast Corporation, Radio Station WKSM(FM), 225 W. Hollywood Blvd., Ft. Walton Beach, FL 32548.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Coordinates at the petitioner's licensed site for Channel 257A at Monroeville are 31-30-51 and 87-17-55.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-228

In the Matter of

Amendment of Section 73.202(b), RM-7293
Table of Allotments,
FM Broadcast Stations.
(Healdsburg, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 13, 1990; Released: May 1, 1990

By the Deputy Chief, Policy and Rules Division:

1. A petition for rule making has been filed on behalf of E & E Communications (petitioner) seeking the allotment of Channel 240A to Healdsburg, California, as that community's second local FM service. Petitioner stated its intention to apply for the channel if allotted.

2. A staff engineering analysis has determined that Channel 240A can be allotted to Healdsburg in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 6.4 kilometers (4.0 miles) west[1] of the community.

3. In view of the fact that Healdsburg could receive an additional local FM service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Healdsburg, California	255B	240A, 255B

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 21, 1990,** and reply comments on or before **July 6, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

E & E Communications
Attn: Evelyn Harding Machtel
1083 West Higgins Lake Drive
Roscommon, MI 48653

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] Coordinates for Channel 240A at Healdsburg are 38-37-47 and 122-56-04.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-407

In the Matter of

Amendment of Section 73.202(b),	RM-6890
Table of Allotments,	
FM Broadcast Stations.	
(Lexington, Mississippi)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 17, 1990; Released: May 2, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 6949 (1989), issued in response to a petition filed by Fanny T. Cothran (petitioner), permittee of Channel 273A, Lexington, Mississippi. Petitioner proposes the substitution of FM Channel 273C3 for Channel 273A, Lexington, Mississippi, and modification of her permit for Station WDLG to specify the higher class channel. Petitioner filed supporting comments in which she reaffirmed her interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 273C3 for Channel 273A at Lexington, Mississippi, since it could provide the community with its first wide coverage area FM service.[1] As indicated in the *Notice*, Channel 273C3 can be allotted to Lexington in compliance with the minimum distance separation requirements of the Commission's Rules.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 15, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Lexington, Mississippi	273C3, 292A

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Channel 273A, Lexington, Mississippi, IS MODIFIED TO SPECIFY operation on Channel 273C3 in lieu of Channel 273A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] J. Scott Communications has requested the substitution of Channel 290C3 for 292A at Lexington, Mississippi. *See* MM Docket 89-373, 4 FCC Rcd 6651 (1989).

[2] The coordinates for Channel 273C3 are 33-09-06 and 90-07-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-233

In the Matter of

Amendment of Section 73.202(b), RM-7089
Table of Allotments,
FM Broadcast Stations.
(Garberville, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 16, 1990; Released: May 2, 1990

By the Deputy Chief, Policy and Rules Division:

1. A petition for rule making has been filed by Eric R. Hilding (petitioner) seeking the allotment of FM Channel 280C1 to Garberville, California, as that community's second local FM service.[1] Petitioner stated his intention to apply for the channel if allotted.

2. A staff engineering analysis has determined that Channel 280C1 can be allotted to Garberville in conformity with the minimum distance separation requirements of the Commission's Rules,[2] without the imposition of a site restriction.

3. In view of the fact that Garberville could receive a second local FM service, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to that community, as follows:

	Channel No.	
City	Present	Proposed
Garberville, California	284C2	280C1,284C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 22, 1990,** and reply comments on or before **July 9, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Eric R. Hilding
P.O. Box 1700
Morgan Hill, CA 95038-1700

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Hilding indicated that this proposal would provide a third FM service to Garberville, based upon the presence of Channel 216C2 in the community. However, it should be noted that in determining the number of aural broadcast services in a community, we consider only commercial service. *See Goshen, Ind.,* 57 FCC 2d 711 at 712 (1975).

[2] Reference coordinates used for Channel 280C1 at Garberville are 40-05-54 and 123-47-36.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-411

In the Matter of

Amendment of Section 73.202(b), RM-6944
Table of Allotments,
FM Broadcast Stations.
(Hazlehurst, Mississippi)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 16, 1990; Released: May 2, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 6987 (1989), issued in response to a petition filed by Copiah County Broadcasting Company (petitioner), licensee of Station WMDC(FM), Hazlehurst, Mississippi. Petitioner proposes the substitution of FM Channel 265C3 for Channel 265A, Hazlehurst, Mississippi, and modification of its license to specify operation on the higher class channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 265C3 for Channel 265A at Hazlehurst, Mississippi, since it could provide the community with its first wide coverage area FM service. As indicated in the *Notice*, Channel 265C3 can be allotted to Hazlehurst in compliance with the minimum distance separation requirements of the Commission's Rules.[1] We have authorized a modification of petitioner's license for Station WMDC(FM), Channel 265A, Hazlehurst, Mississippi, to specify operation on Channel 265C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 15, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Hazlehurst, Mississippi	265C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WMDC(FM), Channel 265A, Hazlehurst, Mississippi, IS MODIFIED TO SPECIFY operation on Channel 265C3, in lieu of Channel 265A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 265C3 are 31-50-00 and 90-11-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-165

In re Applications of

LOUISIANA RADIO LIMITED PARTNERSHIP (hereafter "LRLP")	File No. BPH-871022MI
CARY D. CAMP (hereafter "Camp")	File No. BPH-871022MO
SIMCOTT BROADCASTING, INC. (hereafter "Simcott")	File No. BPH-871022MP

For Construction Permit for a New FM Station in Haughton, Louisiana Channel 279A (103.7 MHz)

HEARING DESIGNATION ORDER

Adopted: March 13, 1990; Released: May 2, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. A preliminary examination of these applications revealed that the entire allocation for Channel 279A at Haughton, Louisiana is short spaced to the proposed first adjacent channel allotment on Channel 278A at Homer, Louisiana. This short spacing is the subject of the Commission's pending proceeding in Docket 84-231. Nonetheless, the applicants for the Haughton allotment will be allowed to proceed to comparative hearing. However, it shall be ordered that any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of Docket 84-231.

3. *LRLP*. LRLP specified in its application that it is a limited partnership consisting of a general partner, William Hendrix, and a limited partner, Louisiana Radio Associates. Principals of the limited partner are involved with numerous other applications for new FM facilities. However, LRLP failed to provide an insulation statement wholly satisfying the requirements of the Commission's *Attribution Reconsideration Order*, 58 RR 2d 604 (1985).[1] In order to ensure its application's compliance with the Commission's multiple ownership rules and cross-interest policy, LRLP will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order.

4. *Other matters*. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after January 11, 1988, the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65 all the amendments are accepted for filing. However, an amendment may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from such amendments will be disallowed.

Applicants	Amendments Filed
LRLP	December 12, 1988; and January 9, June 30, and November 3, 1989
Camp	June 29, October 6, and November 16, 1988; and October 4, 1989

5. Data submitted by the applicants indicate there would be significant difference in the size of the populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That any construction permit awarded as a result of this proceeding shall be made contingent on the outcome of Docket 84-231.

9. IT IS FURTHER ORDERED, That LRLP shall submit to the presiding Administrative Law Judge an amendment to its application pursuant to paragraph 3 hereinabove, within 30 days of the release of this Order.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by LRLP and Camp ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

11. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

12. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

13. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] In order for the limited partners to be exempt from attribution under the Commission's multiple ownership rules, 47 C.F.R. § 73.3555, the applicant must certify that, by the terms of the partnership agreement, its limited partners will refrain from involvement in any material respect in the management or operation of the proposed station and, further, that no limited partner has any interest or connection of any nature with any broadcast station or other medium of mass communication operating within the service area of the proposed station that is or might be inconsistent with the Commission's cross-interest policy under the *Attribution Reconsideration Order,* 58 RR 2d 604, 618 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-166

In re Applications of

JOHN EVES (hereafter "Eves") — File No. BPH-880406MG

UPSTATE COMMUNICATIONS, LTD. (hereafter "Upstate") — File No. BPH-880407MA

ROMAR COMMUNICATIONS, INC. (hereafter "Romar") — File No. BPH-880407MV

GROVER H. HUBBELL D/B/A SEVEN VALLEY BROADCASTING (hereafter "Seven") — File No. BPH-880407NC

For Construction Permit for a
New FM Station on Channel 268A (101.5MHz)
in Homer, New York

HEARING DESIGNATION ORDER

Adopted: March 13, 1990; Released: May 2, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. *Upstate*. The engineering data submitted by Upstate shows that its proposal would not provide a 3.16 mV/m signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. Upstate has indicated that its proposal would reach 95.5% of the area, and requested waiver of the city coverage rule. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/m coverage falls below 80% of the area of the principal community. *See John R. Hughes*, 50 Fed. Reg. 5679 (February 11, 1985). *See also Southwest Communications, Inc.*, released July 16, 1986 (letter from the Chief, FM Branch, reference 8920-HVT). Engineering study reveals that Upstate's 3.16 mV/m contour is in substantial compliance with this requirement. Accordingly, no waiver is required, and Upstate's request for waiver will be dismissed as moot.

4. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Romar has filed such statement, it is deficient. Romar has not listed organizations which it will contact for recruiting women. Accordingly, Romar will be required to file an amended EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

5. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and Romar have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Romar would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. *Late filed amendments*. The applicants below have petitioned for leave to amend their respective applications on the dates shown. The accompanying amendments were filed after June 25, 1988, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	FILED
Upstate	September 14, 1988, March 7, 1989
Seven	July 11, 1988
Eves	February 14, 1990

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Romar would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Upstate's request for waiver 73.315(a) of the Commission's Rules is HEREBY DISMISSED AS MOOT.

10. IT IS FURTHER ORDERED, That Romar will provide the Administrative Law Judge an amended EEO Program which will include organizations which the applicant will contact in order to reinforce its efforts to recruit women.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Seven Valley, Upstate and Eves ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall pursuant to Section 311 (a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: May 2, 1990

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON REQUEST THAT INTERACTIVE EDUCATIONAL VIDEO SERVICES BE CLASSIFIED AS ENHANCED SERVICES

On March 5, 1990, Associated Communications & Research Services, Inc. (ACRS) filed a request that interactive educational video services be classified as enhanced services under Section 64.702(a) of the Commission's Rules. ACRS states that it provides engineering and consulting services to small independent telephone companies in Oklahoma that are considering the development of an interactive educational video network. ACRS also states that this network would use a full-motion, full-color, two-way, interactive video system to provide secondary schools, colleges, and vocational and technical institutions within Oklahoma with communication services. According to ACRS, classrooms on the proposed network would be able to have full, real-time audio and video communications with each other at all times.

ACRS states further that direct interfaces with video switching software would enable non-telephone company personnel to reconfigure the network based on class schedules. ACRS indicates that the interactive educational video network, therefore, involves subscriber interaction with stored information within the meaning of the Commission's definition of enhanced services.

Interested parties may file comments on ACRS' request no later than **May 25, 1990,** and reply comments no later than **June 11, 1990,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. Comments should reference file number AAD 90-16. A copy of each filing should be sent to William A. Kehoe III, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 257, Washington, D.C. 20036 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036. Copies of ACRS's request are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS at (202) 857-3800.

For further information contact William A. Kehoe III at (202) 632-7500.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 29, 1990

Released: May 2, 1990

KRPL, Inc. 8940-DEB
c/o Michael H. Bader, Esq.
Haley, Bader & Potts
2000 M Street, N.W.
Suite 600
Washington, D.C. 20036

In Re: FCC File No. BPCT-880405KF

Dear Sir:

This refers to your petition for reconsideration filed August 18, 1989, on behalf of KRPL, Inc., licensee of stations KRPL and KZFN(FM), Moscow, Idaho. The petition seeks reconsideration of the July 18, 1989 action of the Commission granting the application (BPCT-880405KF) of P-N-P Broadcasting, Inc. (P-N-P) for a construction permit to build a new UHF television station to operate on Channel 24 in Pullman, Washington. *Duane J. Polich*, 4 FCC Rcd 5596 (1989). P-N-P filed a responsive pleading on January 24, 1990.

As background, we note that P-N-P, which is controlled by Duane J. Polich, is the permittee of an unbuilt FM station, KZZL-FM (formerly KPNP(FM)) in Pullman, Washington. Section 73.3555 of the Commission's Rules generally prohibits common ownership of a radio and television station in the same community. Former Note 4 to Section 73.3555, which was in existence at the time the application was filed, however, permitted common ownership of a radio and a UHF television station when the Commission determined on a case-by-case basis that common ownership would be in the public interest. When P-N-P filed its construction permit application, it requested a grant based upon the Note 4 exception. Thereafter, but before the application was approved, the Commission amended section 73.3555. *Amendment of Section 73. 3555 of the Commission's Rules, the Broadcast Multiple Ownership Rule*, 4 FCC Rcd 1741, *reconsidered in part*, 4 FCC Rcd 6489 (1989), and deleted the Note 4 provision permitting consideration of common ownership of a UHF television station and a radio station. In that proceeding, however, the Commission added a new Note 7, effective March 31, 1989, which permits common ownership under certain "more rigorous" standards. *Id.* at 1753. It was upon this new basis that the P-N-P application was approved.

In your petition for reconsideration, you initially state that you did not participate earlier because you had no reason to foresee a change in the Commission's Rules which would permit a grant of P-N-P's application. In addition, you assert that certain facts have come to your attention, which should be considered by the Commission. In that respect, you state that after the grant of its application, Polich made statements in a local newspaper that he "may need local investors" for the television station. You state that you understand that an applicant must have a reasonable assurance of having sufficient funds available to construct the proposed station and operate for three months before it can certify its financial qualifications. In view of the statements in the local newspaper, you contend that significant questions are raised concerning P-N-P's financial qualifications, as well as its candor with the Commission. Because of the plethora of broadcast operations in the Pullman area and in view of what you believe demonstrates P-N-P's inability to finance the television station, you assert that the Pullman market cannot now support P-N-P's proposed radio and television stations and that their addition to the market will cause economic injury to stations licensed there, including those of the petitioner.

As an additional matter, you contend that this is not the first instance of P-N-P's lack of candor. In its application to construct KZZL-FM, P-N-P certified it had reasonable assurance of a tower site. However, in its application (BMPH-880803JX) for an extension of time to construct KZZL-FM, you argue that P-N-P showed that it did not have a reasonable assurance when it stated that it had contacted James Mengelkamp who controlled the site and who had indicated that a site on Tomer Butte might be available, but some additional time was needed because he would have to talk to other family members who had interests in the land. In support of your allegation, you submitted an undated, unsworn statement from James Mengelkamp which states that "at no time has the Mengelkamp family ever agreed verbally, or in writing, to sell property for the purpose of locating a broadcast tower, to P-N-P or any other interested parties."

Section 1.106(b)(1) of the Commission's Rules provides that a petition for reconsideration of an action filed by a person who is not a party to the original proceeding shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good cause why it was not possible for him to participate in the earlier stages of the proceeding. Also, section 1.106(b)(2)(ii) provides that a petition for reconsideration which relies on facts unknown to petitioner until after his last opportunity to present such matters, will be entertained only where it is shown that such matters could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

Based on a review of your pleading, we find that your petition for reconsideration fails to meet the requirements of Section 1.106 of the Rules. You have not shown good cause why it was not possible for you to file a timely petition to deny P-N-P's television construction permit application. The fact that the multiple ownership rules were changed does not support a finding of good cause for your failure to participate earlier. *See Forward Television, Inc.*, 1 RR2d 300 (1963) (where petitioner's reason for late filing, that it "could not conceive" that the Commission would grant the application without a hearing, was unacceptable). Even if the proposed combination had not been considered under the "more rigorous" standard of Note 7 of the new rule, it appears likely that it would have been permitted under the previous Note 4 exception. The Commission had permitted radio/UHF TV combinations pursuant to that exception, where joint ownership would result in activation of an unused TV allocation and/or would result in a first or second TV station in a

community or market. *66 Corporation*, 47 RR2d 1444 (1980) and *Windmill Broadcasting Co.*, 44 RR2d 475 (1978). Nevertheless, while Section 1.106(b) calls for the dismissal of your petition, in our discretion, we will consider the matters raised in your petition on their merits.

In assessing the merits of a petition to deny, a two-step analysis is required under Section 309(d)(1) and (2) of the Communications Act, as reiterated in *Astroline Communications Co. v. F. C. C.*, 857 F.2d 1556 (D.C. Cir. 1988). The first test is whether a *prima facie* case has been raised that a grant of the application would be contrary to the public interest. If so, then the second test is whether there is a substantial and material question of fact to warrant further inquiry. While we have dismissed your petition for reconsideration, we shall apply those standards. We find no *prima facie* case exists.

Turning first to the question regarding P-N-P's financial qualifications and your reliance on a newspaper article for support, the Commission has determined that a newspaper article is not an acceptable substitute for the submission of facts by a person having personal knowledge of the facts alleged. *Mississippi Authority for Educational TV*, 79 FCC2d 577, 579 (1980). Even if we consider the newspaper article upon its face, we do not find any questions raised concerning P-N-P's financial qualifications. The only reference to be found merely states that P-N-P "may need local investors for the Pullman radio and television operation." This statement presents no facts to make a *prima facie* case that P-N-P is not financially qualified or that it has been lacking in candor with the Commission.[1] Moreover, whether the Pullman market can support two additional media outlets has no bearing on P-N-P's financial qualifications. In that regard, the size of the market has never been considered by the Commission in determining an applicant's financial qualifications. Furthermore, whether existing stations in the market will survive economically is no longer a basis for denying P-N-P's application. *Policy Regarding Detrimental Effects of Proposed New Broadcast Stations on Existing Stations*, 3 FCC Rcd 638 (1988), *reconsideration denied*, 4 FCC Rcd 2276(1989).[2]

We also find no support for your allegations regarding P-N-P's alleged lack of candor as it relates to the tower site for its FM station when it initially filed its application. P-N-P's construction permit for the FM station was filed in July 1984 (BPH-8410091C) and was approved by the Commission on February 10, 1987. Your petition questioning P-N-P's tower site was not filed until August 18, 1989, well beyond the time when the grant of the application became final. As we have noted, proceedings that have become final will not be reopened unless there has been fraud on the agency's processes, or unless the result is manifestly unconscionable. *Radio Para La Raza*, 40 FCC2d 1102, 1104 (1973). This has not been shown here.

We are of course concerned about possible misrepresentations and lack of candor. The record before us shows that a month and a half after the FM construction permit application was granted, P-N-P filed a minor modification application to change to a new transmitter location on Paradise Ridge (BMPH-870331IA). In a subsequent application, P-N-P requested an extension of time to construct the FM station (BMPH-880803JX). In the extension application, P-N-P stated that when it initially filed its application to construct the FM station (July of 1984), it believed that it would have a tower site on Tomer Butte, but that James Mengelkamp had indicated that the site might take some time to get because he would have to discuss this with other family members who had interests in the land. Your undated, unsworn letter of James Mengelkamp does not rebut P-N-P's statement; it only indicates that "the Mengelkamp family has never agreed verbally, or in writing, to sell property for the purpose of locating a broadcast tower, to P-N-P . . . or other interested parties." P-N-P did not at any time represent to the Commission that it unequivocally had the Tomer Butte site -- only what it believed to be a reasonable assurance that the site would be available. There is nothing in the record to indicate that P-N-P's statements were intended to deceive the Commission. Intent is a necessary element of misrepresentation and lack of candor. *Fox River Broadcasting, Inc.*, 93 FCC2d 127, 129 (1983). Thus, we find no showing of misrepresentation or lack of candor by P-N-P here. Based on the foregoing, we conclude that no *prima facie* case exists.

Accordingly, your petition for reconsideration, IS DISMISSED and when considered on the merits, IS DENIED.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

cc: P-N-P Broadcasting, Inc.

FOOTNOTES

[1] On January 31, 1990, KPRL, Inc. filed a supplement to its petition, alleging that P-N-P's lack of financial qualifications is further attested to by a purported advertisement from Broadmark Capital Corporation soliciting investors in, or purchasers for, the KZZL-FM construction permit. We find no reason for changing our decision herein based upon this material which, again, is not probative of P-N-P's current financial condition. Moreover, as we have observed, projected expenditures and sources of funds relied upon by applicants in establishing their financial qualifications frequently change and initial proposals are rarely carried out as planned. *See Revision of Form 301*, 50 R.R.2d 381, 382 (1981). More importantly, KPRL, Inc. has not raised a *prima facie* case that P-N-P was not financially qualified when its construction permit was issued, and its allegations as to P-N-P's current financial posture are irrelevant to that earlier determination.

[2] Further, petitioner has not made a *prima facie* case under the standards that were in effect prior to our decision not to look at effects on economic viability of other stations.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Pegasus Broadcasting of Columbus, Georgia, Inc.
Assignor

File No. BALCT-881222KG

and

WTVM Television, Inc.
Assignee

For the Assignment of the License of
Station WTVM(TV), Columbus, Georgia

ORDER

Adopted: April, 20, 1990; Released: May 2, 1990

By the Commisson:

1. The Commission has before it: (a) an Application for Review, filed October 10, 1989 by William H. Schuyler, which seeks review of the September 6, 1989 action of the Chief, Video Services Division, Mass Media Bureau, denying a Petition for Reconsideration of the assignment of the license of television station WTVM(TV), Columbus, Georgia, from Pegasus Broadcasting of Columbus, Georgia, Inc. (Pegasus) to WTVM Television, Inc. (BALCT-881222KG); (b) an Opposition to Application for Review filed October 25, 1989 by Pegasus; and (c) Reply filed November 9, 1989 by Schuyler.

2. We have reviewed the action of the Chief, Video Services Division, and we conclude that the matters were fairly considered and properly decided under applicable precedent. Accordingly, IT IS ORDERED, That, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules, the Application for Review, filed October 10, 1989 by William H. Schuyler, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-31

In the Matter of

Amendment of Section 73.202(b),	RM-5682
Table of Allotments,	RM-5848
FM Broadcast Stations.	RM-5979
(Moscow, Ohio; Paris, Wilmore,	RM-6166
Morehead, Falmouth, Winchester,	RM-6384
Carrollton, Elizabethtown,	RM-6385
Dry Ridge, Somerset, and	
Williamstown, Kentucky).	

ERRATUM

Released: May 2, 1990

1. In the *Memorandum Opinion and Order* in this proceeding, 5 FCC Rcd 927 (1990), the last sentence of paragraph 12 should read, "Although the Somerset site is short-spaced to an applicant for Channel 246C2 at Goodlettsville, Tennessee, that applicant will be permitted to amend its application to meet spacing requirements to the Somerset allotment."

2. Footnote 13 should read, "The applicant is Richard S. Francis (File No. BPH-861217NA). Francis will be required to amend his application. He will also be served with a copy of this *Memorandum Opinion and Order*. "

3. Paragraph 16 should read as follows:

IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Memorandum Opinion and Order* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following applicant for Channel 246C2 at Goodlettsville, Tennessee: Richard S. Francis, 67 Hidden Valley Road, Brentwood, TN 37027 (File No. BPH-861217NA).

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

BellSouth Corporation — AAD 5-1230

On Behalf of Southern Bell Telephone and Telegraph Company

Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations To Authorize Protocol Conversion Offerings

MEMORANDUM OPINION AND ORDER

Adopted: April 25, 1990; Released: May 2, 1990

By the Commission:

1. Telenet Communications Corporation (Telenet) has filed a petition for partial reconsideration of the Commission's Order[1] in this proceeding. That Order granted in part and denied in part applications for review, filed by Telenet and Tymnet, Inc., of an action of the Common Carrier Bureau that waived Section 61.74 of the Commission's Rules, 47 C.F.R. § 61.74. That waiver allowed BellSouth to reference rates for its intrastate packet switching service in its interstate tariff. Although the Commission concluded in the *BellSouth Review Order* that waiver of Section 61.74 was not appropriate in this case, the Commission found nevertheless that, contrary to Telenet's argument, further cost support data were not required. The Commission therefore waived Section 61.38 of the Rules. It also found that investigation of BellSouth's rates was not necessary at that time.[2] Telenet asserts again that Section 61.38 data are essential to any determination of lawfulness and argues again that we should conduct an investigation. It therefore argues that we should reverse the *BellSouth Review Order*. Telenet Petition at 1-2. BellSouth has filed an opposition to Telenet's petition.

2. BellSouth replies that Telenet's petition should be denied for failure to comply with the Commission's Rule concerning reconsideration of Orders that address applications for review. BellSouth Opposition at 4-7. Further, BellSouth argues, the Commission properly exercised its discretion in waiving Section 61.38 of the Rules. BellSouth notes the Commission's finding that Part 61 of the Commission's Rules does not confer procedural rights on private parties but is intended to facilitate the staff's review of tariff filings to determine whether an investigation is necessary. Moreover, BellSouth observes, the Commission's action did not constitute a conclusion as to the lawfulness of its rates. *Id.* at 7-10. Finally, BellSouth urges us not to require any further cost support data at this time even if we reject its other contentions. *Id.* at 10-11.

3. We dismiss Telenet's petition for its failure to comply with Section 1.106(b)(2) of the Commission's Rules, 47 C.F.R. § 1.106(b)(2). That section provides that

> where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circumstances is present: (1) the petition relies on facts which relate to events which have occurred or circumstances which have changed since the last opportunity to present such matters; or (2) the petition relies on facts unknown to the petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.

Telenet's petition presents no new facts or changed circumstances. Telenet argued in its application for review that the Commission should require BellSouth to file additional cost support and that the Commission should investigate BellSouth's rates, the same arguments that it advances here. [3] Obviously, the fact that the application for review was denied in part is insufficient "changed circumstances" to permit Telenet to seek reconsideration of the *BellSouth Review Order*. Were this not true, Section 1.106(b)(2) of the Commission's Rules would be essentially meaningless. As the Commission noted in the *BellSouth Review Order*, the Commission has made no finding as to the lawfulness of BellSouth's rates. Telenet remains free to avail itself of the complaint procedures contained in Section 208 of the Communications Act, 47 U.S.C. § 208.[4]

4. Accordingly, IT IS ORDERED that the petition for reconsideration filed by Telenet Communications Corporation IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] BellSouth Corporation, 3 FCC Rcd 6961 (1988) (*BellSouth Review Order*).

[2] *Id.* at 6962.

[3] The fact that the waiver that Telenet opposes now is a waiver of Section 61.38 of the Rules, rather than Section 61.74, is irrelevant. Telenet's argument now is, in substance, no different than the argument that the Commission denied in the *BellSouth Review Order* -- *i.e.*, that we should investigate BellSouth's rates.

[4] Although we dismiss Telenet's petition for failure to comply with Section 1.106(b)(2) of the Rules, we note that Telenet's argument is without merit. First, as the Commission stated in the *BellSouth Review Order*, Part 61 of the Rules is intended to assist the staff in reviewing tariff filings; it does not confer procedural rights on private parties. 3 FCC Rcd at 6962. This is true of both Section 61.38 and Section 61.74 of the Rules. Moreover, Telenet's argument that we should direct BellSouth to file additional cost support data has already been considered

and rejected twice -- once by the Bureau in the *BellSouth Compliance Order* and again by the Commission in the *BellSouth Review Order*. Telenet has not demonstrated that this contention merits consideration yet a third time.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 18, 1990

Released: April 25, 1990

The Helen Broadcasting Company
Limited Partnership
529 Main Street
Boston, Massachusetts 02129

Boston Celtics Broadcasting
Limited Partnership
c/o Celtics Communications, Inc.
150 Causeway Street
Boston, Massachusetts 02114

WFXT, Inc.
5151 Wisconsin Avenue, N.W.
Washington, D.C. 20016

Dear Applicants:

This letter is in reference to your respective applications (BAL-891106EE and BALCT-891129KE) seeking the Commission's consent to the assignment of the licenses of station WEEI(AM), Boston, Massachusetts, from The Helen Broadcasting Company Limited Partnership ("Helen Broadcasting"), to the Boston Celtics Broadcasting Limited Partnership ("Boston Celtics Broadcasting"), and of station WFXT(TV) (Fox Broadcasting, Channel 25), Boston, Massachusetts, from WFXT, Inc. ("WFXT, Inc."), to the Boston Celtics Communications Limited Partnership ("Boston Celtics Communications"). A petition to deny the assignment application of station WEEI(AM) was filed by the Committee for Community Access ("Committee"), and an informal objection to the assignment application of WFXT(TV) was filed by Northstar Television of Providence, Inc. ("Northstar"), licensee of station WNAC-TV (Fox Broadcasting, Channel 64), Providence, Rhode Island. Responsive pleadings were also filed.

THE PETITION

Committee is a voluntary nonprofit association composed of members of the broadcast audience residing in the Boston, Massachusetts area. It claims that the assignment application of station WEEI(AM) should be denied because Helen Broadcasting did not give adequate local notice of its pending application. In that regard, Committee first claims that Helen Broadcasting failed to place a copy of the Commission's November 24, 1989 public notice accepting Helen Broadcasting's assignment application in station WEEI(AM)'s public inspection file. Secondly, Committee asserts that Helen Broadcasting published notice of the filing of its assignment application in three successive editions of *The Boston Sunday Herald* rather than twice a week in a local daily newspaper for two consecutive weeks. In addition, Committee contends that the assignee, Boston Celtics Broadcasting, intentionally delayed amending the assignment application for station WEEI(AM) to reflect the acquisition of WFXT(TV), until after the time for filing petitions had expired.

In opposition, Helen Broadcasting argues that the public notice released by the Commission on November 24, 1989, gave Committee constructive notice that the assignment application for station WEEI(AM) had been accepted for filing by the Commission. Helen Broadcasting states that pursuant to Section 309(b) of the Communications Act, it is solely the responsibility of the Commission to provide notice to the public of its acceptance of an application. Moreover, Helen Broadcasting states that Section 73.3526(a)(1) of the Commission's Rules does not require it to place a copy of the Commission's November 24, 1989, public notice in WEEI(AM)'s station file. Helen Broadcasting does concede, however, that, due to harmless error, it mistakenly initially published notice of its application in the Sunday edition of *The Boston Herald* for three consecutive weeks. Upon finding its error, Helen Broadcasting states that the notice was correctly republished twice a week for two weeks in the daily edition of *The Boston Herald*, in accordance with Section 73.3580(c)(1)(i). Helen Broadcasting also attests that the public had various alternative sources of notification of the proposed sale of station WEEI(AM). In addition to the Commission's public notice and the local notice in *The Boston Herald*, Helen Broadcasting states that its assignment application was available in WEEI(AM)'s station file for public inspection, and that public notice of its application was broadcast over station WEEI(AM).

With regard to the assignment application of station WFXT(TV), Helen Broadcasting states that, on December 29, 1989, it timely filed an amendment to its WEEI(AM) assignment application to report the subsequent filing of the WFXT(TV) application, and the resulting cross-ownership interest of Celtics Communications in the two stations. Helen Broadcasting asserts that Committee's concerns with waiver of the cross-ownership rules should be submitted in reference to the WFXT(TV) assignment application, which contains the cross-ownership interest waiver request.

In its opposition, Boston Celtics Broadcasting states that it did timely amend its application for WEEI(AM) within thirty days after the filing of the WFXT(TV) assignment application by Boston Celtics Communications, and reported the ownership interests of Celtics Communications, Inc. ("Celtics Communications"), as general partner, in both of these applicants. Boston Celtics Broadcasting maintains that the timing of its amendment has not precluded Committee from filing a protest against the waiver request included in the WFXT(TV) assignment application.

DISCUSSION OF PETITION

In assessing the merits of a petition to deny, a two-step analysis is required under Section 309(d)(1) and (2) of the Communications Act. *See, e.g., Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988). The first test is whether a *prima facie* case that a grant of the application would be inconsistent with the public interest has been made. If so, then the second test is whether there is a substantial and material question of fact to warrant further inquiry.

We first address the issue regarding public notice. Under the Commission's rules, applicants for assignment of license for broadcast stations are required to publish a notice of their filing in a daily newspaper of general circulation published in the community in which the station is located, at least twice for two consecutive weeks in a three-week period. *See* Section 73.3580(c)(1)(i). In addition, if the station involved is an operating station, notice must be broadcast by the station at least once daily on four days in the second week immediately following the tendering for filing of the application. *See* Section 73.3580(d)(3)(i).

Helen Broadcasting initially published local notice of the filing of its assignment application in *The Sunday Boston Herald* for three consecutive weeks. After finding that this publication was incorrect under the rule, it republished the local notice correctly in the daily edition of *The Boston Herald*, in accordance with Section 73.3580(c)(1)(i). In cases where the applicant either failed to publish or improperly published the required local notice, the Commission requires the applicant to republish correctly the local notice, and to advise the Commission of this fact. *See, e.g., Intercontinental Radio, Inc.*, 88 F.C.C.2d 819, 824 (1981); *Walter Lan Harber*, 45 R.R.2d 1312, 1313 (Broadcast Bureau, 1979) Thus, Helen Broadcasting's subsequent republication of the local notice remedied the initial error and is consistent with Commission precedent. Furthermore, it is undisputed that Helen Broadcasting gave proper notice over the air of the proposed sale of station WEEI(AM). Under these circumstances, we are persuaded that Helen Broadcasting has substantially complied with its local notice requirements, and that Committee's opportunity to participate in this matter has not been prejudiced by Helen Broadcasting's actions. We also conclude that the newspaper publication discrepancies noted above, which have been corrected, do not raise any substantial and material question of fact.

We further note that Section 309(b) of the Communications Act requires the Commission to issue a public notice of the acceptance for filing of an application, which commences a thirty-day period within which petitions to deny the application may be filed. This statutory provision constitutes the only public notice required to be given by the Commission to an interested party for it to exercise its right to participate in the agency's actions. It is solely the responsibility of the Commission to provide the public notice. *See, e.g., Central Mobile Radio Phone Service*, 65 F.C.C.2d 648, 648 n.1, 649-51 (1977). Thus, the public notice released by the Commission on November 24, 1989, gave proper notice to Committee of the agency's acceptance of the assignment application for station WEEI(AM) which was filed by Helen Broadcasting. Helen Broadcasting was not required to place the notice in its public inspection file. *See* Section 73.3526 of the Commission's Rules. Accordingly, no *prima facie* case of a rule violation with respect to the public notice has been made.

We also find that Committee has not submitted any basis to support its assertion that disclosure of the proposed acquisition of WFXT(TV) was deliberately delayed in order to foreclose its filing of a petition to deny the cross-ownership of stations WEEI(AM)/WFXT(TV), and accordingly, has not made a *prima facie* case on this issue. Disclosure of the cross-ownership interest by the applicants was not required until the assignment application and the waiver request for station WFXT(TV) were filed on November 29, 1989. Within thirty days of the WFXT(TV) application, Boston Celtics Broadcasting filed its amendment to the WEEI(AM) application to report the cross-ownership interest. This fully complies with the filing requirements of Section 1.65 of the Commission's Rules. Thus, had Committee chosen to object specifically to the waiver request, it could have done so by filing an informal objection against the amended WEEI(AM) application in accord with Section 73.3587 of the Commission's Rules or by petitioning to deny the WFXT(TV) application pursuant to Section 73.3584 of the Rules.

DISCUSSION OF MOTIONS FOR STAY

Committee also filed "Motions For Stay," which request that we defer processing the above-referenced assignment applications. Committee claims that the two amendments to the WEEI(AM) application, which were filed on December 29, 1989 and January 11, 1990, were "major" amendments, pursuant to the Commission's Rules, and that new local public notices and new 30-day periods to file petitions to deny are, therefore, required. Committee further contends that it cannot evaluate whether WFXT, Inc. will completely divest itself of its cross-ownership interest in station WFXT(TV) and *The Boston Herald*. According to Committee, the Asset Purchase Agreement, filed with the WFXT(TV) assignment application, is incomplete, since it does not contain a referred to "Limited Partnership Agreement" regarding Boston Celtics Broadcasting, the proposed assignee of WEEI(AM). In addition, Committee maintains that other arrangements between the parties suggest that WFXT, Inc. will retain a significant role in Boston Celtics Communications, the proposed assignee of WFXT(TV).

Upon review of the allegations and materials before us, we find that Committee has not set forth persuasive reasons justifying withholding action on the WFXT(TV) and WEEI(AM) assignment applications. On December 29, 1989, the WEEI(AM) application was amended to report that Celtics Communications is the general partner of both Boston Celtics Broadcasting and Boston Celtics Communications, and that Don F. Gaston "had transferred" his 52.2% interest in Celtics Communications to his son, Paul E. Gaston. It appears, however, that that statement was in error, for on January 11, 1990, the applicant expressly withdrew the earlier amendment and concurrently replaced it with another amendment. This latter amendment apprised the Commission that Mr. Gaston "had transferred" only a 49% interest, not his full 52.2% interest in Celtics Communications to his son, Paul, and had retained a 3.2% interest. This transfer of a 49% stock interest did not result in a change of control of Celtics Communications. The original parties to the WEEI(AM) assignment application still retain a 51% controlling interest in Celtics Communications after the transfer to Mr. Gaston's son. As the Commission has noted, a change of ownership of an applicant will be treated as a "major change" only if the original parties to the application do not retain more than a 50% ownership interest. *See Processing of Broadcast Applications*, 56 R.R.2d 941, 945 (1980). Since the January 11, 1990 amendment was only a "minor change," republication of local public notice and the provision of an additional period of time in which to petition to deny the proposed assignment were not required. *See* Sections 73.3580 and 73.3584 of the Commission's Rules.[1] Contrary to Committee's claims, we further find that the WFXT(TV) assign-

ment application is not incomplete, nor has WFXT, Inc. retained an impermissible interest in the assignee. With respect to broadcast station purchase agreements, related or referred to agreements are not required to be submitted to the Commission, if the purchase agreement contains sufficient information demonstrating that the purported purchaser will have full control over the station and its assets once the transaction has been approved and consummated. *Storer Communications, Inc.*, 61 R.R.2d 454, 458 (1986); and *Wometco Entrprises, Inc.*, 55 R.R.2d 1545, 1551 (1984). *See also, Revision of Form 301*, 50 R.R.2d 381, 382 (1981). Our review of the WFXT(TV) purchase agreement, along with the materials filed concurrently, reveals that Celtics Communications will have total control over the station and its assets. Finally, the financial arrangements agreed to by the parties to this transaction, as well as the "Right of First Refusal" granted WFXT, Inc., do not constitute impermissible interests under the Commission's multiple ownership rules. The "Right of First Refusal," which was filed with the Commission, unequivocally states that the principals of WFXT, Inc. only have the option of converting the promissory note they will receive from Celtics Communications into a general partnership interest *in the future*. In accord with Note 2(f) to Section 73.3555, holders of promissory notes and options with rights of prospective conversion are not attributed with cognizable ownership interests. *See Attribution of Ownership Interests*, 97 F.C.C.2d 997, 1022 (1984), *reconsidered in part*, 58 R.R.2d 604 (1985), *further reconsidered*, 1 F.C.C. Rcd. 802 (1986). Under these circumstances, we conclude that WFXT, Inc. has not retained an impermissible cross-ownership interest in WFXT(TV) and *The Boston Herald*. Accordingly, the "Motions For Stay" will be denied.

THE INFORMAL OBJECTION

Northstar objects to the proposed assignment of WFXT(TV) because it claims that the Boston Celtics and WFXT are engaging in anticompetitive business practices. Northstar states that WNAC-TV broadcasts Fox programming and, for the past two seasons, had also broadcast approximately 30 Boston Celtics basketball games,[2] and that its signal is carried by Heritage and Dimension cable television systems in Providence, Rhode Island. Northstar notes, however, that Heritage and Dimension ceased carriage of the WFXT(TV) signal as of January 1990, and January 1989 respectively. To regain cable carriage, Northstar represents that the cable relations director for WFXT, Inc. advised Heritage and Dimension that they could only cablecast 1990-91 Celtics basketball season games if they carried the signal of the new WFXT(TV) station on their respective systems. Thus, Northstar concludes that the Celtics will grant exclusive rights to the new WFXT(TV) station to telecast the Boston Celtics basketball games, thereby denying other television stations located more than 35 miles outside the Boston market from acquiring Celtics basketball programming, in violation of Section 73.658(m) of the Commission's Rules. Northstar also contends that, since November 1989, it has unsuccessfully negotiated with Fox to obtain non-duplication rights for its coverage areas located more than 35 miles south of Boston, which Fox has refused to grant WNAC-TV, without providing any explanation. Northstar notes, however, that in markets where there is no Fox-owned television station, Fox has routinely granted non-duplication rights. Northstar, therefore, concludes that Fox and the Celtics have concertedly used their respective control over their programming to deny other television stations in adjacent markets from acquiring programming rights which constitutes an improper refusal to deal in violation of the antitrust laws.

Boston Celtics Communications states that the National Basketball Association ("NBA") authorizes the Celtics, as a copyright holder of the telecast rights to certain Boston Celtics basketball games, to license these rights to television stations to broadcast a designated number of games within the Boston Celtics "Home Broadcast Territory." As an example, Boston Celtics Communications cites that, in 1984, the Celtics and Gannett Massachusetts Broadcasting, Inc., licensee of WLVI-TV, entered into a Telecast Rights Agreement wherein WLVI-TV was granted exclusive over-the-air rights to telecast the Celtics' 1989-90 NBA season. Under the Telecast Rights Agreement, Boston Celtics Communications states that WLVI-TV was authorized to distribute the Celtics basketball programs to other television stations in the Celtics' Home Broadcast Territory, creating a "New England Network." Boston Celtics Communications represents that, with the proposed purchase of WFXT(TV), WFXT(TV) will have the exclusive right to produce and telecast the Boston Celtics basketball games, beginning with the 1990-91 NBA season, which will be substantially similar to the arrangement the Celtics had with WLVI-TV. Boston Celtics Communications submits that the licensing arrangement of the Celtics does not constitute the type of programming covered by Section 73.658(m) of the Commission's Rules, because it is the television station granted the telecast rights which actually produces and distributes the Boston Celtics basketball games.

WFXT and Fox contend that their business decisions to withhold rights to their programming from WNAC-TV are not anticompetitive. With respect to Fox, it states that, although it recently adopted a policy where the majority of its affiliates have received network nonduplication rights, these rights were denied WNAC-TV because its average net weekly cumulative audience ratings are significantly below the average ratings for all Fox Broadcasting Company affiliates. WFXT maintains that the Celtics are not a program supplier and are not covered by Section 73.658(m) because they merely authorize a broadcast station licensee to produce and televise certain Boston Celtics basketball games.

DISCUSSION OF INFORMAL OBJECTION

Northstar's informal objection involves two basic contentions: (1) that a violation of Section 73.658(m) (the non-network territorial exclusivity rule) or alternatively Section 73.658(b) (the network territorial exclusivity rule) will result from the assignment of WFXT(TV) to Boston Celtics Communications and its conduct as a licensee thereafter; and (2) that the conduct of Boston Celtics Communications, as the buyer of the station, and Fox, Inc., through its interest in the sale of the station and its involvement in the operation of the Fox Broadcasting system, will result in antitrust violations. We conclude that the conduct in question would not constitute a violation of the territorial exclusivity rules and that, in accordance with established policy, the alleged antitrust violation should be addressed by a court of competent jurisdiction, the Federal Trade Commission, or other governmental unit charged with the responsibility of policing

such activity before being considered by the Commission. Although Northstar has raised these issues only by way of an informal pleading, we believe they warrant a brief discussion.

Territorial Exclusivity. The Boston Celtics basketball organization, whose ownership is not identical, but overlaps significantly, with the proposed licensee of station WFXT, holds the rights to authorize the telecasts of certain Boston Celtics basketball games and the National Basketball Association permits the team to license a designated number of these games for broadcast in the Celtics' "Home Broadcast Territory." For the 1989-90 season the Celtics agreed with another Boston station not involved here, that it would produce and distribute these games. For the 1990-91 season, although no final decision has been reached, it has generally been agreed that this producer/distributor role will be shifted to WFXT(TV). According to a sworn statement from the Executive Vice President of the partnership which owns the Celtics basketball team, there are no agreements between the Celtics and WFXT(TV) regarding the stations to which the basketball games will be distributed for the 1990-91 season. This decision, it is said, will be reached only after the station assignment has taken place.

Section 73.658(m) of the Commission's Rules prohibits any agreement between a television station and any "program producer, distributor, or supplier, or other person" which prevents or hinders another television station in a community over 35 miles away from broadcasting any program purchased by the former. The network territorial exclusivity rules is substantially similar in form, but limits the area of permissible exclusivity of the purchasing station to its community of license.

Neither the literal language of these rules nor the history of their adoption suggest that they impose any compulsory obligations on program producers and distributors to make programming available in any particular pattern or to any given market. *Territorial Exclusivity in Nonnetwork Programming*, 42 F.C.C.2d 175 (1973), *reconsidered in part*, 46 F.C.C.2d 892 (1974); *Report on Chain Broadcasting* (*Docket No. 5060)*, 57-59 (May, 1941). Rather, the rules are intended simply to assure the producer/distributor or network is not deprived of the right to sell to any station in a separate market (for purposes of the non-network rule) or community (for purposes of the network rule) by virtue of a contract or understanding with any station to whom the programming has already been sold. That is, the rule was intended to free the producer/distributor from contractual restraints rather than to impose any new sale or distribution obligation and the Commission has recognized the fact that "programs will not necessarily be sold to all stations participating in the bidding competition." *Territorial Exclusivity in Nonnetwork Programming*, 42 F.C.C.2d at 183.

In light of the absence of any final decision, contract, or agreement between the Celtics basketball organization and station WFXT and between WFXT and stations that may broadcast these games during the next season, it is premature and speculative to attempt a resolution of this matter in the present proceeding. Thus, based on the information now before us, we cannot conclude that the assignment proposed will result in a *prima facie* violation of the territorial exclusivity rules. Station WFXT, if present plans are consummated, will be the producer and distributor of the Celtics' games for the Celtics' "Home Broadcast Territory." No agreement, contract, or understanding has been brought to our attention which precludes WFXT(TV), like WLVI-TV presently does, from selling these programs to WNAC-TV or to any station in the Celtics' home broadcast territory.

Moreover, we note that the station as producer and distributor of the events is not required by the rules to license these specific programs to other stations just as, for example, it would not be required to supply its own news or other locally produced programming to such stations. The decision of the producer to make such a sale or not is a contractual matter between the parties. Such programs are subject to the protection of the copyright laws. These laws apply to broadcast sports programming. Thus, in *Baltimore Orioles, Inc. v. Major League Baseball Players Assn.*, 805 F.2d 663 (7th Cir. 1986), the court found that the Major League Baseball Clubs owned an unilateral copyright in the telecast of Major League Baseball games which entitled the clubs to retain revenues and which was governed by the provisions of the Copyright Act of 1986. Here, the Celtics hold a joint copyright interest, with the National Basketball Association, in the television right to the Celtics basketball games, which can be freely sold, subject to applicable antitrust requirements, for over-the-air broadcast by local station and national networks.

Cable Television Exclusivity and Carriage Issues. Northstar's antitrust-based objections center on cable television carriage and exclusivity within the Providence-New Bedford television market. Both Northstar's station, WNAC-TV in Providence, and WFXT(TV) in Boston are affiliated with the Fox Broadcasting system. The signal of WFXT(TV) has been deleted from carriage on two large cable systems in the Providence-New Bedford television market. The conduct which is said to be anticompetitive, involves the effort of WFXT(TV) to have these deletion decisions reversed. In furtherance of this end, it is said, WNAC-TV has been denied contractual cable television exclusivity rights by Fox, and a representative of WFXT(TV) has suggested to cable system operators that their only access to Celtics games will be through carriage of WFXT(TV). This effort, while not alleged to violate the cable television syndicated exclusivity or network nonduplication rules, Northstar claims, involves a "refusal to deal" that is "unfair," "clearly anticompetitive," "would violate the antitrust laws" and would be "contrary to the public interest."

Although Northstar is apparently arguing that ownership of the Celtics game rights themselves constitute a monopoly, there is otherwise no effort in its objection to establish the proper scope of the geographic or product markets involved, to specify what specific provisions of the antitrust laws have been violated, or to demonstrate how the conduct in question restrains trade or establishes a monopoly. That such conduct may advantage WFXT(TV) in obtaining cable carriage and disadvantage WNAC-TV by subjecting it to additional competition, does not constitute a *prima facie* case that what is involved is anticompetitive activity, rather than simply competitive conduct. Thus, if we were to attempt a full antitrust analysis on our own, that would be difficult to do with the information before us. We certainly cannot conclude that the monopoly over these program rights, deliberately created by the Copyright Act, when exercised through marketing decisions by WFXT(TV), itself creates a *prima facie* demonstration of an antitrust violation.

We have, however, previously deemed it inappropriate to engage in the initial investigation of the antitrust laws when other governmental agencies have been given primary responsibility in policing antitrust and anticompetitive activity. *Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d 1179, 1202, *reconsidered in part*, 1 F.C.C. Rcd. 421 (1986). Accordingly, for the purposes of a character determination, we consider only adjudications involving antitrust or anticompetitive violation from a court of competent jurisdiction, the Federal Trade Commission, or other governmental unit charged with the responsibility of policing such activity. *Id.* We have been presented with no arguments here to justify deviating from that approach. We will take cognizance of any final determination by the courts or by the relevant government agency should Northstar institute such proceedings in connection with this matter. *See Golden West Associates, L. P.*, 59 R.R.2d 125 (1985); *Cahill and Kaswell*, 37 R.R.2d 197 (1976). In light of our policy in *Character Qualifications*, we find that Northstar has failed to argue a *prima facie* case.

DISCUSSION OF THE WAIVER REQUEST

The general partner of both Boston Celtics Broadcasting and Boston Celtics Communications is Celtics Communications, Inc. ("Celtics Communications"). Section 73.3555(b) provides that television/radio combinations cannot be created where the Grade A contour of the television station encompasses the city of license of the radio station, as is proposed here. Accordingly, Boston Celtics Communications has requested a waiver of the rule. The Commission, in *Amendment of Section 73. 3555, Second Report and Order*, 4 F.C.C. Rcd. 1741, (" *Second Report and Order* "), *reconsidered in part*, 4 F.C.C. Rcd. 6498 (1989), set out standards for reviewing requests for waivers of the rule. The Commission concluded that it would look favorably on waiver requests involving radio and television station combinations in the top 25 markets where 30 or more separately owned voices would remain after the proposed combination, as determined by counting full-service television licensees in the relevant ADI television market and radio licensees in the relevant television metropolitan market. 4 F.C.C. Rcd. at 1751.

In support of its waiver request, Boston Celtics Communications states that Boston is the 6th largest television market, serving 2,045,100 Arbitron ADI households. According to a showing submitted by Boston Celtics Communications, there are at least 51 separately owned or operated commercial broadcast voices in the Boston market. In addition to meeting the Commission's benchmark of "top 25 markets/30 voices", Boston Celtics Communications states that common ownership of WEEI(AM) and WFXT(TV) will result in efficiencies which will permit each station to provide better service to the public. Specifically, Boston Celtics Communications anticipates that the stations may share administrative personnel and a chief engineer. Boston Celtics Communications also represents that the stations will share a computer system, and professional service providers, and will jointly sponsor community events and participate in public service campaigns. Boston Celtics Communications asserts that these joint operations will produce cost savings which will provide the stations with additional resources for more news and local programming. Boston Celtics Communications concludes that, since the Boston market has an abundance of additional voices and the common ownership of stations WEEI(AM) and WFXT(TV) will create operating efficiencies, a grant of its waiver request is warranted.

In our *Second Report and Order*, above, we stated that we would look favorably upon waiver requests that meet the "top 25 market/30 voices" standard previously discussed. We also determined that the advantages of permitting radio-television combinations in the top 25 markets, which have numerous competing voices, generally would not undermine the benefits derived from the Commission's traditional pro-competitive and diversity policies. In this case, since Boston is the 6th largest market and since there will be more than 30 separate voices in that market after the proposed assignment, Boston Celtics Communications has met the standard and the requested waiver will be granted.

CONCLUSION

Accordingly, since we find that Committee for Community Access has not either made a *prima facie* case or raised a substantial and material question of fact, its petition to deny, and its motions for stay, ARE DENIED. Further, the informal objection filed by Northstar Television of Providence, Inc., IS DENIED. Finally, the request of Boston Celtics Communications Limited Partnership for a waiver of the Commission's cross-ownership rule, Section 73.3555(b), to permit the common ownership of radio station WEEI(AM) and television station WFXT(TV) in Boston, Massachusetts, IS GRANTED.[3]

We further find that the applicants are fully qualified and that grant of the applications will serve the public interest, convenience and necessity. Accordingly, the applications (BAL-891106EE and BALCT-891129KE) ARE GRANTED, effective on the date of adoption of this letter.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

cc: Committee for Community Access
Northstar Television of Providence, Inc.

FOOTNOTES

[1] A transfer of Mr. Gaston's entire interest to his son would have constituted a "major change" in ownership, warranting additional local notice publication within 30 days of the tendering of the major amendment. *See* Section 73.3580 of the Commission's Rules. It would also have required holding Commission action in abeyance until the opportunity for public comment on the WEEI(AM) assignment application, as amended, had passed. *See* Section 73.3584 of the Commission's Rules. Had this occurred here, however, the recission of the initial transfer, well within the 30-day period in which to inform the community of this action, would constitute sufficient reason for permitting the applicant's withdrawal of the earlier amendment and our consideration of the January 11, 1990 amendment only.

[2] WNAC-TV had purchased the Boston Celtics basketball games through WLVI-TV, Boston, Massachusetts, which has had the exclusive right to carry these games.

[3] Consummation of the sale of station SFXT(TV) from WFXT, Inc. to Boston Celtics Communications Limited Partnership will bring Twentieth Holdings Corporation into compliance with Section 73.3555(c) of the Commission's Rules. *See, Twentieth Holdings Corporation,* 4 F.C.C. Rcd. 4052 (1989). Twentieth Holdings Corporation owns all of the stock of WFXT, Inc., licensee of WFXT(TV).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 25, 1990

Released: May 2, 1990

8330-SB
C8-821

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

David E. Henderson, President
Outlet Communications, Inc.
111 Dorrance Street
Providence, RI 02903

Re: Atlin Communications, Inc.
Former Licensee of WXIN(TV)
Indianapolis, Indiana

Dear Mr. Henderson:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended [47 U.S.C. Section 503(b)], under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's rules (47 C.F.R. Section 0.283). The Video Services Division recently granted the application of Atlin Communications, Inc., for assignment of WXIN's license to Chase Broadcasting of Indianapolis, Inc. (BALCT-891006KE). The assignment was granted, subject to the condition that Atlin and Outlet Communications, Inc., Atlin's parent corporation, comply, jointly and severally, with any action taken by this Commission pursuant to this investigation.

On April 24, 1989, the Commission initiated an inquiry concerning WXIN's sale of time to political candidates during the 1988 elections. The inquiry was based on remarks made by your then-General Sales Manager, Raymond Hunt, which were quoted in the April/May issue of *INTV Journal*. Because those remarks appeared to be inconsistent with the "lowest unit charge" requirement of Section 315(b) of the Communications Act [47 U.S.C. Section 315(b)] and Section 73.1940(b) of our rules [47 C.F.R. Section 73.1940(b)], we asked for WXIN's comments regarding its compliance with the requirement. We also requested WXIN's political file.

We received WXIN's response and its political file, including the 1988 rate cards, on May 30, 1989. WXIN explained that it offered two different classes of time to political candidates, non-preemptible "Fixed Rate" and immediately preemptible "Lowest Unit Rate," and that WXIN arrived at these political rates by using the normal rate card, available to commercial advertisers, as a basis. WXIN further stated that most of the candidates requested fixed rate spots to ensure that their announcements were broadcast. Mr. Hunt, in his affidavit which was submitted with the response, stated that WXIN sold political advertising in accordance with the law and that he was "quoted out of context" in the *INTV Journal* article. WXIN also attested that it handled political advertising in a proper manner, except for a few instances. WXIN explained that a review of the station's political file indicated that some candidates were "inadvertently charged more than the lowest prevailing rate" for certain programs. According to WXIN, all of the listed political broadcasts were non-preemptible fixed position spots which aired within the 60-day period preceding the November 8, 1988, election. Specifically, WXIN listed the following eight political announcements and explained that the overcharges were being refunded to the candidates:

Candidate	Date of Advertisement	Time of Broadcast	Length: Seconds
John Mutz	10/22/88 SA	10 pm - 11 pm	30
	10/22/88 SA	11 pm - 12:30 am	30
	10/23/88 SU	9 am - 12 noon	30
	10/30/88 SU	9 am - 12 noon	60
	11/06/88 SU	9 am - 12 noon	60
Evan Bayh	10/30/88 SU	7 pm - 10:30 pm	30
	10/29/88 SA	7 pm - 8 pm	30
	11/05/88 SA	7 pm - 8 pm	30

	Rate Charged	Lowest Unit Charge	Excess Refunded
John Mutz	$575	$500	$ 75
	350	300	50
	270	230	40
	540	460	80
	540	460	80
Total gross refund to John Mutz			$325
Evan Bayh	$1000	$ 725	$275
	1025	1000	25
	1025	1000	25
Total gross refund to Evan Bayh			$325

On August 30, 1989, WXIN responded to our further inquiry dated July 25, 1989. WXIN included the commercial invoices which we requested and a statement by Mr. Hunt concerning the discrepancies appearing on WXIN's fourth quarter 1988 Political Rate Card.

Section 315(b) of the Act provides:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed --

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

> (2) at any other time, the charges made for comparable use of such station by other users thereof.

See also 47 C.F.R. Section 73.1940(b). "Lowest unit charge" means the lowest advertising rate offered or sold by the station for a particular *class*, *amount of time* and *period* or program. It also means that a candidate is entitled to all discount privileges offered by the station to commercial advertisers, including any volume discount offered even if the candidate buys only one spot. When a candidate buys advertising time outside the pre-election periods, the charges may not exceed those made for comparable use of the station by other advertisers. Additionally, Section 73.1940(c) of the rules [47 C.F.R. Section 73.1940(c)] states in part:

> In making time available to candidates for public office, no licensee shall make any discrimination between candidates in practices, regulations, facilities, or services for or in connection with the service rendered pursuant to this part, or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage. . . .

The Commission's review of WXIN's responses, the contents of WXIN's political file, and the additional documents it has provided reveal 14 apparent violations of Section 315(b) of the Act and Section 73.1940 of the rules in that WXIN failed to afford legally qualified candidates the station's lowest unit charge or charged some candidates more for the same use of the station than other candidates for the same class and length of spot in the same period of time [Section 73.1940(b)]. In addition to the eight lowest unit charge violations which WXIN acknowledges in its response, it appears that WXIN overcharged candidates on six other occasions, four involving the lowest unit charge provision and two involving the Commission's rule against discrimination [Section 73.1940(c)].

The additional four apparent violations involving the lowest unit charge provision occurred during the 45-day period before the May 3, 1989, primary. Your political file indicates that John Mutz, Republican candidate for Governor, purchased announcements in excess of the lowest unit charge, as follows:

Candidate	Date of Advertisement	Time of Broadcast	Length Seconds
John Mutz	4/25/88 MO	8 pm - 10 pm	30
	4/27/88 WE	8 pm - 10 pm	30
	4/28/88 TH	8 pm - 10 pm	30
	5/03/88 TU	8 pm - 10 pm	60
	Rate Charged	Lowest Unit Charge	Excess Charged
	$425	$375	$ 50
	425	375	50
	425	375	50
	850	750	100
Overcharges to John Mutz			$250

The lowest rate sold by WXIN for a 30-second non-preemptible fixed rate announcement during the Monday through Friday WXIN 8 O'Clock Movie was apparently $375. It appears from the above excerpt that Mr. Mutz was not afforded the lowest unit charge for three 30-second announcements and one 60-second announcement (two times the 30-second rate), in violation of Section 315(b) of the Act and Section 73.1940(b) of the rules. The two apparent violations of the no-discrimination rule occurred before the 60-day pre-election period and thus, the lowest unit charge provision does not apply. The political file indicates that Mr. Bayh, the Democratic candidate for governor, was charged more than his Republican opponent, Mr. Mutz, for the same class, length and period of time on the following two occasions:

Candidate	Date of Advertisement	Time of Broadcast	Length: Seconds
John Mutz	8/29/88 MO	9 pm - 11 pm	30
	9/02/88 FR	9 pm - 11 pm	30
Evan Bayh	8/29/88 MO	9 pm - 11 pm	30
	9/02/88 FR	9 pm - 11 pm	30
	Rate Charged	Excess Charged	
John Mutz	$270	0	
	270	0	
Evan Bayh	325	$55	
	325	55	
Overcharges to Evan Bayh		$110	

The purpose of this rule against discrimination is to afford competing candidates equal treatment in the use of broadcast facilities, including practices related to the availability and purchase of advertisements. By affording Mr. Mutz a lower advertising rate than Mr. Bayh for the same 30-second non-preemptible announcements during the same program, it appears that WXIN discriminated against Mr. Bayh in a manner that clearly could cause "prejudice or disadvantage," in violation of Section 73.1940(c) of the rules. *See Midnight Sun Broadcasters, Inc.*, 40 RR 2d 660 (B/c Bur. 1977); *WPRY Radio Broadcasters, Inc.*, 40 FCC 2d 1183, 1193 (1973).

Regarding your statement that the eight overcharges discovered by the station were being refunded to the candidates, a licensee's intent to make restitution for lowest unit charge violations has not dissuaded the Commission from imposing forfeitures. *KAYS, Inc.*, 43 FCC 2d 1183 (1973); *De La Hunt Broadcasting Corp.*, 51 RR 2d 1189 (1982). The Commission has clearly stated that corrective action subsequent to notification of a possible violation does not relieve a licensee of its liability. *See Executive Broadcasting Corporation*, 3 FCC 2d 699 (1966). Here, WXIN's refunds to the political candidates overcharged were made only after a Commission inquiry had begun. The lowest unit charge provision was intended to permit wider use of broadcasting stations by candidates for public office by decreasing the cost of air time. Charging more than the lowest unit charge and making restitution after election day does not remedy the harm done to the candidates.

To summarize, it appears that WXIN charged candidates for public office more than the lowest unit charge on 12 occasions and discriminated against a candidate on 2 occasions during the 1988 primary and general election seasons. As indicated by information in WXIN's responses and refund letters, it appears that the station has refunded the eight overcharges it discovered, a gross amount of $650 worth of overcharges for political spot time. An examination of the six additional apparent violations reveals that WXIN has made additional overcharges of $360 ($250 to John Mutz and $110 to Evan Bayh). You are directed to take appropriate action to rebate all such overcharges to the affected candidates, if you have not already done so. You are requested to advise the Commission within twenty (20) days of the date of this letter of the actions you have taken in this regard.

As stated above, we have reviewed WXIN's Political and Commercial Rate Cards for the fourth quarter of 1988, and the commercial invoices WXIN submitted. The commercial advertisers were apparently offered three classes of rates for spots, an immediately preemptible, a preemptible with seven days notice, and a non-preemptible fixed rate, whereas candidates were offered only two classes, an immediately preemptible rate, significantly lower than the immediately preemptible rate offered to commercial advertisers, and a non-preemptible fixed rate which, except for three programs, was the same rate as the preemptible with notice rate offered to commercial advertisers. We believe that your adherence to the political rate card constitutes a violation of the lowest unit provision of Section 315(b) of the Act and Section 73.1940(b) of the rules. That provision entitles candidates to all discount privileges, including the right to buy all classes or categories of preemptible spots (*e.g.*, preemptible spots with notice, immediately preemptible spots, and run of schedule spots), which the broadcaster offers to commercial advertisers. *Hernstadt v. FCC*, 677 F.2d 893 (D.C. Cir. 1981); *see also Public Notice on Lowest Unit Charge*, 4 FCC Rcd 3823 (1988); *WHDH, Inc.*, 23 FCC 2d 763 (1967). Specifically, the violation results from your failure to include on the political rate card the higher, immediately preemptible rate that was offered to commercial advertisers. If candidates had purchased the preemptible spots available to them at the published political rate, such spots were not likely to run, since they would have been preempted or "bumped" by the higher preemptible rates offered to commercial advertisers. Although candidates are entitled to these preemptible spots which are more likely to run, WXIN's political rate card apparently constrained candidates to purchase fixed time at higher rates in order to have the assurance of running that commercial advertisers had at lower preemptible rates. The information you submitted indicates that WXIN sold over 350 political spots to four legally qualified candidates and one major party committee during the time the Political Rate Card was in effect (October 3 to November 8, 1988) and in all instances, political spots ran only at the fixed rates. An analysis of the information you submitted regarding commercial advertisers indicates that they apparently ran at the preemptible rates. Thus, it appears that WXIN wilfully circumvented Section 315(b) of the Act and Section 73.1940(b) of the rules during that period of time.

Based on the foregoing, it appears that WXIN wilfully and repeatedly violated Section 315(b) of the Communications Act and Section 73.1940 of the Commission's rules by overcharging candidates on the 14 occasions cited and by failing to make available to candidates all discount privileges for all classes of spots otherwise offered to commercial advertisers. Accordingly, pursuant to Section 503(b) of the Communications Act, you are hereby advised of your apparent liability for a forfeiture of ten thousand dollars ($10,000) for your apparent violations of 47 U.S.C. Section 315(b) and 47 C.F.R. Section 73.1940 in the manner and on the dates described above. The amount specified was reached after consideration of the factors set forth in 47 U.S.C. Section 503(b)(2).

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's rules (47 C.F.R. Section 1.80), as summarized in the attachment to this letter. Any comments relating to your ability to pay should include financial items as set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC BELL AAD 6-1326

Petition for Waiver of Section 64.702
of the Commission's Rules and
Regulations to Authorize
Protocol Conversion Offerings

MEMORANDUM OPINION AND ORDER

Adopted: April 25, 1990; Released: May 3, 1990

By the Commission: Commissioner Duggan concurring in the results.

I. INTRODUCTION

1. In a *Memorandum Opinion and Order* herein, 1 FCC Rcd 996 (1986) (the *Waiver Order),* the Chief, Common Carrier Bureau accepted the protocol conversion compliance plan filed by Pacific Bell (Pacific). The *Waiver Order* allowed Pacific to provide asynchronous to X.25 and asynchronous to X.75 protocol conversion services jointly with its basic packet-switched data transmission service. It also permitted Pacific to collocate equipment to provide the protocol conversion and basic services and to market, bill and collect, and install and maintain these services without adhering to the structural separation requirements of the *Computer II* rules.[1] On January 5, 1987, Telenet Communications Corporation (Telenet) and Tymnet-McDonnell Douglas Network Systems Company (Tymnet) each filed an Application for Review of the *Waiver Order.* For the reasons set forth below, we deny or dismiss the applications for review.

II. BACKGROUND

2. The *Computer II* rules required the American Telephone and Telegraph Company (AT&T) and (upon the divestiture of the Bell System) the Bell Operating Companies (BOCs) to offer "enhanced services" on an unregulated basis through subsidiaries separated from their regulated operations. "Enhanced services" includes protocol conversion offerings.[2] Subsequently, in the *Protocols Decision,* [3] the Commission established criteria which would, if met, support waiver of the requirement that protocol conversion offerings be made through separate subsidiaries. Soon thereafter, at the request of the BOCs, the Commission ruled that conversions between the X.25 format and the X.75 format (used in interconnecting networks) could be treated as a basic service.[4] Several BOCs then requested waivers of the *Computer II* separation requirements to permit them to provide conversion from asynchronous protocols to X.25 packet-switched network protocols in conjunction with basic packet switching services and using facilities located in their central offices. Asynchronous to X.25 conversion permits the very large number of terminals and other equipment using asynchronous transmissions, including most personal computers, to have access to packet switched networks. In the *Protocol Waiver Order,*[5] the Commission determined that the public interest would be served by permitting BOCs to offer asynchronous to X.25 protocol conversions using equipment in the central offices of the regulated entities. However, to protect against anticompetitive behavior, the Commission conditioned the collocation waiver on the BOCs meeting certain specified requirements. The *Protocol Waiver Order* also established criteria for waiver of the *Computer II* rules if a BOC wished to jointly market protocol conversion services.[6]

3. On January 21, 1986, Pacific filed a plan with the Common Carrier Bureau asking that it be found in compliance with the collocation conditions, and seeking a waiver to permit joint marketing, billing, and installation. Tymnet and Telenet, along with two other parties, filed comments opposing various aspects of Pacific's filing. In its objections, Tymnet stated, *inter alia,* that Pacific's filing could not be assessed because projected cost and revenue data for Pacific's public packet-switched service had not been provided. Tymnet noted that Pacific's filing clearly contemplated that the packet-switched service would be used to access interstate offerings of other service providers, and that therefore the Bureau should direct Pacific to furnish its packet switching service pursuant to interstate access tariffs and to furnish data to support its charges.

4. Telenet objected that Pacific's filing was unaccompanied by any proposed federal tariff for its public packet-switched service, and that the only federal tariffing which Pacific contemplated was an amendment to its federal access tariff adding X.75 interface access. Telenet asserted that a significant portion of Pacific's public packet-switched traffic would be interstate, because Pacific would interconnect with carriers offering service throughout the United States. Telenet claimed that in similar circumstances the Commission had required that such a "mixed" service be tariffed at the federal level and that Pacific's approach was more extreme than that of other BOCs who sought to file federal tariffs merely incorporating their state tariffs by reference. Telenet also objected to Pacific's proposal to include the entire charge for the packet-switched service, including both basic and enhanced elements, under tariff. Telenet maintained that Commission policies preclude the tariffing of an enhanced service. Telenet also stated that Pacific proposed to charge no more for the enhanced packet service than for the basic, unconverted service, except for the Network Utilization Rate Element (NURE) surcharge.

5. In the *Waiver Order,* the Bureau found that Pacific had demonstrated compliance with the requirements specified in the *Protocol Waiver Order,* and accepted Pacific's compliance plan, permitting it to collocate protocol conversion equipment in its central offices. The Bureau also granted Pacific a waiver permitting joint marketing and billing, subject to certain conditions. The Bureau rejected the contentions that Pacific's plan should not be accepted because Pacific failed to file a federal tariff and support data, and that the enhanced service was improperly priced. The Bureau stated that Pacific had received a waiver of Section 61.74 of our Rules, permitting it to reference its state tariffs in its federal filing. The Bureau found that this waiver "in essence" relieved Pacific from filing the cost support data accompanying the tariff filing.[7]

The Bureau rejected Telenet's argument that tariffing the NURE is a violation of the *Computer II* rules. It found that the *Protocol Waiver Order* specifically required that the tariffed service include a NURE for any port through which an asynchronous device was connected to the system.[8]

III. THE PLEADINGS

A. Telenet's Application for Review

6. Telenet seeks review of the *Waiver Order* because, in its view, that order: (1) mischaracterizes and rejects Telenet's contention that Pacific's proposal fails to meet the *Protocol Waiver Order*'s requirement that certain costs of offering protocol conversion be recovered by non-tariffed charges; and (2) improperly finds that Pacific has complied with the tariffing requirements of the *Protocol Waiver Order*.

7. Telenet claims that in the *Waiver Order* the Bureau mischaracterized its comments regarding Pacific's failure to recover its "non-zero" costs, and that consequently the Bureau did not address Telenet's actual argument. Telenet states that it argued that all of the charges for Pacific's enhanced protocol-converted packet service were contained in its tariff, and that thus Pacific was improperly tariffing an enhanced service. According to Telenet, the *Protocol Waiver Order* indicated that there must be a difference between the pricing of the basic X.25-to-X.25 service and the enhanced asynchronous-to-X.25 service, because the carrier would experience "non-zero" costs in connection with the provision of protocol-converted packet services.[9] Telenet asserts that it argued in its comments that these costs should be included in the carrier's prices.

8. Telenet states in its application for review that the Bureau thought that Telenet was arguing that the NURE was improperly tariffed, cited language in the *Protocol Waiver Order* requiring the tariffing of the NURE, and dismissed Telenet's contention. Telenet insists, however, that its objection to Pacific's proposal is not that the NURE is tariffed, but that the NURE represents the only difference in price between the basic and enhanced services. Telenet states that the *Waiver Order* apparently assumes that the NURE is designed to recover all the costs associated with the provision of protocol conversion, when in fact the NURE is only intended to recover costs incurred by the basic packet network due to the performance of the enhanced, protocol conversion function within the packet switch and concentration equipment. Telenet states that, in addition to the costs recovered through the NURE, other "non-zero" costs of providing protocol conversion which should be recovered by the carrier through its charges include: installation and maintenance expenses associated with that portion of the carrier's packet equipment which is allocated "below-the-line" to protocol conversion; depreciation associated with such "below-the-line" equipment; marketing and sales; billing and collections; and general overhead. Telenet claims that none of these would be recovered under Pacific's pricing scheme because the tariffed NURE charge represents the only difference between the charge for the basic service and the net charge for protocol converted calls.

9. Telenet claims that the proposed charges for Pacific's basic packet-switched service which it has filed with the California Public Utilities Commission (CPUC) are extremely low (well below those imposed by any other BOC) and that it is questionable that the revenues of the tariffed basic packet service will cover the costs of providing the service. Telenet states that even assuming that Pacific's tariffed rates will permit it to recover its costs of providing its basic service, they may not be sufficient to recover as well the "non-zero" costs of providing protocol-converted packet service. Therefore, in its view, there exists a strong probability that Pacific's protocol-converted packet service, which competes with the enhanced protocol-converted packet service of Telenet and others, will be priced below cost, rendering it anticompetitive and predatory. Telenet claims that the *Waiver Order* effectively nullifies the protections against potential anticompetitiveness which the Commission imposed in its *Protocol Waiver Order*.

10. Telenet also seeks review of the Bureau's decision to permit Pacific to offer its protocol-converted packet-switched service without tariffing it at the federal level. Telenet argues that the Bureau has delegated the Commission's tariff review function to the CPUC without authority and in violation of the Commission's intent as set forth in the *Protocol Waiver Order*. Telenet states the Bureau noted Pacific's claim that the service is entirely intraLATA and intrastate, but failed to address Telenet's counter-arguments regarding the jurisdictional nature of packet-switched traffic. Pacific did not file a federal tariff for its basic packet service, but merely amended its Federal Access Tariff to offer an X.75 interface at no charge. Telenet claims that the position that data traffic originating or terminating outside California and entering or leaving Pacific's network through an X.75 gateway is intraLATA or intrastate is directly contrary to this Commission's own jurisdictional rulings. Telenet states that because Pacific had not filed any cost support data with this Commission (and because the data filed with the CPUC were not made public), we must reject Pacific's filing as failing to comply with established policies and rules governing the tariffing of interstate services, including those of a "mixed" (i.e., both interstate and intrastate) nature.

11. Telenet notes that the Bureau waived Section 61.74 of the Commission's rules, which allowed Pacific to reference its state tariffs in its federal filing, and concluded that the action "in essence, relieves it from filing the accompanying cost support data."[10] Telenet states that the *Waiver Order* contains no justification of why a waiver of Section 61.74 (barring a tariff reference to other documents) operates "in essence" as a waiver of Section 61.38 (requiring the submission of specific cost data in support of federal tariffs). It states that although a waiver of Section 61.38 might logically be requested in conjunction with a waiver of Section 61.74 upon a showing that the cost support data filed with the state would be available to this Commission and interested parties, Pacific made no such request and could make no such justification. Telenet views the Bureau's action as depriving this Commission of any continuing oversight of the manner in which Pacific offers its packet-switched service and delegating to the CPUC authority over rates for services which are interstate in nature.

B. Tymnet's Application for Review

12. Tymnet seeks review solely of the Bureau's failure to require Pacific to file a fully supported federal tariff for its interstate packet-switched services. Tymnet states Pacific has previously acknowledged that its packet-switched offerings would be available as a means for customers to access other service vendors on an intra- and interLATA basis. Tymnet claims that because many of these other service vendors provide interstate common carrier services or enhanced services by means of data transmissions that are predominately interLATA and interstate in nature, at least some portion of the traffic that transverses Pacific's packet-switched network will be jurisdictionally interstate as well.

13. Tymnet states that although the Bureau acknowledged the existence of the jurisdictional concerns raised by Tymnet and Telenet, its terse disposal of the matter (described in para. 10, *supra)* glossed over the fundamental defect of Pacific's compliance filing -- Pacific's simplistic and erroneous assertion that all of the traffic which traverses its public packet-switched network will necessarily be intrastate in nature. Tymnet claims that Pacific has provided no credible evidence suggesting that its packet-switched network will function from a jurisdictional perspective in a manner differing in any significant respect from the packet-switched networks of other BOCs, which the carriers have admitted or the Bureau has found to be at least partially interstate in nature. Tymnet claims that the operative question is whether the packet-switched network will be used to complete the interstate transmissions handed off to Pacific by the interexchange carriers. Tymnet states that if the network is used to complete such transmissions, a federal tariff should be on file for such interstate packet-switched access.

14. Tymnet states that the Bureau's failure to resolve the fundamental jurisdictional questions raised by Pacific's compliance filing is cause for concern regarding the scope of this Commission's authority over all BOC-provided services which may be used to access interstate facilities. It states that the Commission should recognize that Pacific's compliance with the *Protocol Waiver Order* cannot be monitored effectively unless the Commission is able to verify that the carrier is charging just and reasonable rates for the packet-switched service as a whole. Tymnet argues that given the fact that the Commission has chosen to allow the BOCs to offer competitive, enhanced packet-switched services under tariff, rather than on a fully unregulated basis, it is essential that the Commission retain its tariff review authority over the BOCs' packet-switched services. Otherwise, it claims, it will be a relatively simple matter for the BOCs to pay lip service to the requirements of the *Protocol Waiver Order* while at the same time circumventing the Commission's competitive safeguards by, for example, underrepresenting the costs of non-waiver related components of the service or inflating demand for the service. Tymnet states that there is no justification for the abdication of tariff review authority that is implicit in the Bureau's *Waiver Order*. It states that the Bureau's failure to address and resolve the fundamental jurisdictional issues raised by Pacific's compliance filing requires that the *Waiver Order* be set aside insofar as it authorizes Pacific to offer an unquestionably interstate service without requiring it to file a fully supported federal tariff for the service.

C. Pacific's Opposition

15. Pacific opposes review of both the issues raised in the applications. Pacific states that the grant to it of a waiver permitting it to reference its state tariff for certain rates associated with a public packet switching interface in its interstate tariff was in full compliance with Commission rules and practice. Pacific claims that Tymnet and Telenet apparently misunderstand and mischaracterize the tariffing aspect of its offering structure and attempt to suggest such a structure is somehow inconsistent with the proper exercise of FCC jurisdiction. Pacific states that while the FCC clearly has jurisdiction over calls which originate in one state and terminate in another, it is a well-established practice of the FCC to defer to state rate and tariff regulation when a local provision of service is involved and the state regulation involved does not conflict with federal regulatory law or policy. Pacific claims that its public packet-switched service is "perfectly configured" for application of this practice. It states that traffic handled by Pacific over its public packet-switched network will be either intraLATA or must exit Pacific's LATA boundary through a gateway obtained under tariff by a private user or a common carrier other than Pacific. Pacific also states that its rate structure imposes no discriminatory rate upon a call which may ultimately be carried interstate by another user or carrier. Pacific argues that its tariff structure for packet switching does not present a situation where state regulation conflicts with federal law or policy and that it does not deprive the FCC of oversight capability to ensure that the offering structure is in harmony with federal law and policy.

16. Pacific claims that Telenet's discussion of the recovery of non-zero costs is unclear. It states that this discussion seems to concentrate on Telenet's apparent and mistaken belief that certain non-zero costs of providing protocol conversion would not be recovered under Pacific's pricing structure. Pacific states that the NURE is designed to recover investment and operational costs specifically associated with protocol conversion inefficiencies, while other costs (including marketing, maintenance, billing, and overhead) are equivalent on a per unit basis between basic and enhanced service and are consequently recovered through the usage charge to which the NURE is applied. Pacific states that the Bureau specifically considered Telenet's position and found that Pacific's accounting plan and cost allocation procedures were in accordance with its requirements and that Telenet's position is unfounded.

IV. DISCUSSION

A. The Referencing of State Tariffs.

17. Most BOCs that submitted protocol conversion compliance plans sought and were granted a waiver of Section 61.74 of our rules to incorporate by reference in their federal tariff the rates for packet-switched services contained in state tariff. The Commission reviewed the Bureau's approval of this procedure in the *BellSouth Order*.[11] In that proceeding the Bureau had granted BellSouth a waiver of Section 61.74 of the Rules permitting it to reference rates for its intrastate packet-switched services in its interstate tariff. In the *BellSouth Order*, the Commission affirmed its jurisdiction over the rates charged by carriers for interstate packet switching services and concluded that the carrier's rates for those

services should be included in its federal tariff. The Commission found that, under the circumstances presented by BellSouth, a waiver of Section 61.74 was not justified. Under BellSouth's proposal, customers who desired to obtain interstate packet-switched service could not determine by examining the BellSouth interstate tariff what the applicable rates would be. BellSouth had presented no reason for requiring customers seeking an interstate service to consult a state tariff in order to determine what the rates of the interstate service would be. Accordingly, the Commission directed BellSouth to file in its interstate tariff its currently effective rates for its packet-switched service.

18. As a result of the resolution of the identical tariff cross-referencing issue in the *BellSouth Order*, we need not rule on Telenet's and Tymnet's argument thereon. On December 28, 1988 the Bureau rescinded its waiver of Section 61.74 of the Rules and required Pacific to file a federal tariff containing the terms, conditions and rates for the interstate packet switched service.[12] The portions of the applications that seek review of the Bureau's grant of a waiver permitting the cross-referencing of state tariffs accordingly are dismissed as moot.[13]

19. We also conclude that the objection to the Bureau's waiver of the cost support filing requirements set forth in Section 61.38 of the Rules is unfounded. In the *BellSouth Order*, the Commission rejected Telenet's assertion that the Bureau should have required BellSouth to file the detailed cost and demand projections for packet switched service. The Commission noted that Part 61 of the Rules is intended to assist the Bureau in reviewing tariff filings and does not confer procedural rights on private parties. The *BellSouth Order* concluded that it was not necessary to obtain such detailed data for tariff review purposes, because existing market conditions made it unlikely that BellSouth could engage in anti-competitive or otherwise improper pricing.[14]

20. The factors the Commission relied on therein are equally applicable to the instant proceeding. As we noted in the *Southwestern Bell Order*,[15] the detailed projections required by Section 61.38 would be of little value in our review of a BOC's packet switched service at this time. Moreover, the presence of a federal tariff and our willingness to entertain a complaint should problems arise adequately demonstrate that we have not abandoned our authority to the states. We are able, and will not hesitate, to obtain whatever cost support data are necessary to effectively monitor Pacific's federal rates. Accordingly, we deny the objections to the Bureau's waiver of Section 61.38.

B. The Recovery of "Non-Zero" Costs

21. Telenet asks that we reject Pacific's compliance filings because Pacific's proposed rates for its enhanced, protocol-converted service appearing in its state tariff may not be sufficient to recover certain "non-zero" costs which will be incurred in providing that service. The result, Telenet claims, is "a strong probability that Pacific's enhanced protocol-converted packet service, which competes with the enhanced packet-switched services of Telenet and others, will be priced below cost, thereby rendering it anticompetitive and predatory."[16] After conclusion of the pleading cycle, we asked Pacific to file additional information on its pricing policies.[17] In its response, Pacific asserts that its proposed packet switched service tariff imposes the same charge whether net protocol conversion service is used because "protocol conversion is an inherent part of the packet switching technology utilized in the Public Packet Switching Service network for both basic and net protocol converted calls."[18]

22. We find that Telenet's contention of anti-competitive pricing by Pacific does not warrant rejection of Pacific's compliance filings in this matter. The Bureau has reviewed the packet switching tariff filings submitted by Pacific and has found no need to reject or suspend and investigate them.[19] There is no evidence that Pacific's tariffed rates are set so low that they do not recover the costs of the tariffed service, a contention upon which Telenet bases part of its argument for rejection of Pacific's filings.[20] Moreover, the Commission has stated, as to pricing of nonregulated services, "in the regulated sphere we have a responsibility to enforce a statutory prohibition against unjust and unreasonable charges that encompasses rates that are unreasonably low or "predatory" . . ., whereas we usually have no proper interest in the prices charged for nonregulated services."[21] Although the Commission expressed some concern over the pricing of protocol conversion, including the recovery of "non-zero" costs, in the *Protocol Waiver Order*, it has since recognized that "the characteristics of this [the packet switching] market minimize the possibility of anti-competitive or otherwise improper pricing."[22] While these characteristics may change, at present Pacific is a new entrant in a competitive market dominated by well-established service providers. We believe that our position of refraining from inquiry into the pricing of carriers' nonregulated enterprises should be continued in these circumstances. Therefore, we deny Telenet's request for rejection of Pacific's compliance filings.

V. ORDERING CLAUSE

23. Accordingly, IT IS ORDERED pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), That the applications for review filed by Telenet Communications Corporation and Tymnet-McDonald Douglas Network Systems Company are DISMISSED to the extent indicated above, and are otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 64.702 of the Commission's Rules and Regulations, 47 C.F.R. §64.702. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (*Second Computer Inquiry*), 77 FCC 2d 384 (1980) (*Final Decision*), *reconsideration*, 84 FCC 2d 50 (1980), *further reconsideration*, 88 FCC 2d 512 (1981), *aff'd sub nom.* Computer and Communications Industry Ass'n v. FCC, 693 F. 2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983), *aff'd on second further reconsideration*, FCC No. 84-190 (released May 4, 1984).

[2] Section 64.702(a) of the Commission's Rules, 47 C.F.R. §64.702(a). As part of our *Third Computer Inquiry*, we have modified our regulatory scheme applicable to enhanced services, including protocol conversion services, by substituting nonstructural safeguards for the structural safeguards adopted in the Second Computer Inquiry. *See* Amendment of Section 64.702 of the Commission's Rules and Regulations (*Third Computer Inquiry)*, 104 FCC 2d 958 (1986) (*Computer III Phase I Order), modified on reconsideration*, 2 FCC Rcd 3035 (1987), *further reconsideration*, 3 FCC Rcd 1135 (1988), *second further reconsideration*, 4 FCC Rcd 5927 (1989), *appeal pending sub nom.* California v. FCC, No. 87-7230 ((9th Cir.) (pet. for rev. filed May 28, 1988) and *sub nom.* Illinois Bell Telephone Co. v. FCC, No. 88-1364 (D.C.Cir.) (pet. for rev. filed May 16, 1988). *See also Report and Order*, 2 FCC Rcd 3072 (1987) (*Computer III Phase II Order), modified on reconsideration*, 3 FCC Rcd 1150 (1988), *further reconsideration*, 4 FCC Rcd 5927 (1989), *appeal pending sub nom.* California v. FCC No. 88-7183 (9th Cir.) (pet. for rev. filed May 13, 1988).

[3] Communications Protocols under Section 64.702 of the Commission's Rules and Regulations, *Memorandum Opinion and Order and Statement of Principles*, 95 FCC 2d 584 (1983).

[4] Petitions for Waiver (X.25/X.75), *Memorandum Opinion and Order*, FCC 84-561 (released November 28, 1984).

[5] Petitions for Waiver of Sections 64.702 of the Commission's Rules (Computer II), 100 FCC 2d 1057 (1985) (*Protocol Waiver Order)*.

[6] *Protocol Waiver Order*, 100 FCC 2d at 1104.

[7] *Waiver Order*, 1 FCC Rcd at 1003.

[8] *Id.*

[9] *See Protocol Waiver Order*, 100 FCC 2d at 1109. The Commission defined "non-zero" costs associated with provision of protocol conversion as installation and maintenance expenses associated with that portion of the carrier's packet equipment which is allocated "below-the-line" to protocol conversion; depreciation associated with such "below-the-line" equipment; marketing and sales; billing and collections; and general overhead. *Id.*

[10] *Waiver Order*, 1 FCC Rcd at 1003.

[11] BellSouth Corporation on Behalf of Southern Bell Telephone and Telegraph Company, Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations to Authorize Protocol Conversion Offerings, 3 FCC Rcd 6961 (1988) (the *BellSouth Order), recon. denied*, FCC 90-171 (Adopted April 25, 1990).

[12] *See* letter from John Cimko, Jr., Chief, Tariff Division to M. J. Miller, Executive Director, Pacific Bell, dated December 28, 1988.

[13] We recently dismissed similar concerns with respect to Southwestern Bell Telephone Co.'s packet switching. *See* Southwestern Bell Telephone Co., Petition for Waiver of Section 64.702 of the Commission's Rules and Regulations to Provide and Market Asynchronous Protocol Conversion on an Unseparated Basis, *Memorandum Opinion and Order*, 5 FCC Rcd 161 (1990) *(Southwestern Bell Order)*.

[14] *BellSouth Order*, 3 FCC Rcd 6962. We noted that in 1985, Telenet and Tymnet controlled 67 percent of the market. Id. at n. 11.

[15] *Southwestern Bell Order*, 5 FCC Rcd at 164.

[16] Telenet Petition at 6.

[17] *See* letter from Kenneth P. Moran, Chief, Accounting and Audits Division to Robert L. Barada, Pacific Bell, dated October 28, 1988.

[18] Response of Pacific Bell, November 14, 1988 at 2.

[19] Public Packet Switching Service, New York Telephone Company, Revisions to Tariff F.C.C. No. 41, Pacific Bell, Amendment of Tariff F.C.C. No. 128, Southwestern Bell Telephone Company, Revisions to Tariff F.C.C. No. 68, Ameritech Operating Companies, Amendment of Tariff F.C.C. No. 89, BellSouth Telephone Companies (on behalf of South Central Bell Telephone Company), Amendment of Tariff F.C.C. No. 1, *Memorandum Opinion and Order*, 4 FCC Rcd 3382 (Com.Car. Bur. 1989).

[20] Telenet states that "although Telenet is unable to demonstrate that Pacific Bell's revenues from its tariffed 'basic' packet service will not cover its costs of providing that service, Telenet strongly believes that to be the case." Telenet Application for Review at p. 6.

[21] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, *Report and Order*, 2 FCC Rcd 1298 (1987) *(Joint Cost Order), recon.*, 2 FCC Rcd 6283 (1987) *(Reconsideration Order), further recon.*, 3 FCC Rcd 6701 (1988) *(Further Reconsideration Order), petition for review denied sub nom.*, Southwestern Bell Corp. v. FCC, No. 87-1764 (March 2, 1990).

[22] *BellSouth Order*, 3 FCC Rcd at 6962.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-584

In re Applications of

EDWIN A. BERNSTEIN, *et al.* File No. BPH-870330NC, *et al.*

For a Construction Permit For a
New FM Station on Channel 241A,
Center Moriches, New York

ORDER

Adopted: April 20, 1990; Released: May 3, 1990

By the Commission:

1. Before the Commission for consideration are a Decision, *Edwin A. Bernstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989); an Application for Review filed on January 8, 1990 by The Lefebvre Group;[1] and Oppositions filed on January 19, 1990 and January 23, 1990 by Edwin A. Bernstein and Hamptons Communications Limited Partnership respectively; a Motion to Strike Hampton's Opposition filed by Lefebvre on March 15, 1990;[2] and an Opposition to Motion to Strike filed by Hamptons Communications Limited Partnership on March 23, 1990. We agree with the Board's resolution of this matter and we therefore adopt its decision.

2. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. §1.115(g), the Application for Review filed January 8, 1990 by The Lefebvre Group, IS DENIED.

3. IT IS FURTHER ORDERED, That the Motion to Strike filed on March 15, 1990 by the Lefebvre Group is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Lefebvre contends that the Review Board failed to address its argument that reinstatement of its application was required even if its financial amendment is disallowed, because such an amendment is not a condition precedent to prosecution of an application, citing *RKO General, Inc.*, 24 RR 2d 16, 19 para. 5 (1972). However, Lefebvre's argument is without merit in light of the Commission's ruling in *Chudy Broadcasting Corp.*, 58 RR2d 133 (1985), affirming the dismissal of an application for lack of a financial proposal. Significantly, the Commission there noted that "temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the initiation of new service." 58 RR 2d at 134 n.7.

[2] Lefebvre has made no showing in its Motion to Strike that Hampton's Opposition contained anything of a nature requiring it to be stricken.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 90-53

In the Matter of

New England Area Public Safety Plan

ORDER

Adopted: April 26, 1990; Released: May 3, 1990

By the Chief, Private Radio Bureau and the Chief Engineer:

1. On October 4, 1989, the New England Area (Region 19) submitted its public safety plan to the Commission for review. Region 19 is comprised of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut (except Fairfield, Litchfield, New Haven, and Middlesex Counties). The plan sets forth the guidelines to be followed in allotting spectrum to meet current and future mobile communications requirements of the public safety and special emergency entities operating in its region. On February 5, 1990, Region 19 filed revisions to the plan, based on conversations with the Commission's staff.

2. The Region 19 plan was placed on Public Notice for comments on February 22, 1990, 55 FR 6046 (Feb. 21, 1990). The Commission received no comments in this proceeding.

3. We have reviewed the plan submitted for Region 19 and find that it conforms with the National Public Safety Plan. The plan includes all the necessary elements specified in the *Report and Order* in Gen. Docket No. 87-112, 3 FCC Rcd 905 (1987), and satisfactorily provides for the current and projected mobile communications requirements of the public safety and special emergency entities in Region 19.

4. Accordingly, IT IS ORDERED that the Public Safety Radio Plan for Region 19 IS ACCEPTED. Furthermore, licensing of the 821-824/866-869 MHz band in Region 19 may commence immediately.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Thomas P. Stanley
Chief Engineer

Before the
Federal Communications Commission
Washington, D.C. 20554

MM DOCKET NO. 88-382

In re Applications of

WWOR-TV, Inc. File No. BRCT-871221KE
Secaucus, New Jersey

For Renewal of License of Station
WWOR(TV), Secaucus, New Jersey

and

GARDEN STATE BROADCASTING LIMITED PARTNERSHIP File No. BPCT-871223KG

and

WHITELY COMMUNICATIONS File No. BPCT-880321KM

For Construction Permit for a
New Television Station
Secaucus, New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 1990; Released: May 3, 1990

By the Commission:

1. WWOR-TV, Inc. (WWOR-TV), the licensee of station WWOR-TV in Secaucus, New Jersey, seeks renewal of its license for station WWOR-TV. Competing applications for a construction permit were filed by Garden State Broadcasting Limited Partnership (Garden State) and by Whitely Communications (Whitely). The ALJ dismissed Whitely's application for failure to prosecute, and the Review Board affirmed the ALJ's action on November 7, 1989. *WWOR - TV, Inc.*, FCC 89M-2206 (released September 6, 1989), appeal denied, 4 FCC Rcd 8127 (1989), application for review pending.

2. On August 31, 1989 Garden State Broadcasting Limited Partnership, pursuant to 47 C.F.R. § 1.245 of the Commission's rules, filed a motion requesting that Administrative Law Judge Richard L. Sippel withdraw as the Presiding Judge in the above-captioned comparative renewal proceeding. By his Order of September 27, 1989, the Presiding Judge denied Garden State's motion. *WWOR - TV, Inc.*, FCC 89M-2368 (released September 29, 1989) (Nonwithdrawal Order). On October 5, 1989, Garden State filed exceptions to the ALJ's ruling not to withdraw from this proceeding. In accordance with 47 C.F.R. § 1.245(b)(4), the ALJ subsequently certified the withdrawal question to the Commission, suspended the proceeding pending a ruling by the Commission on this question, held trial dates in abeyance pending further order, and cancelled the hearing scheduled to begin on November 6, 1989. *WWOR - TV, Inc.*, FCC 89M-2440 (released October 10, 1989).

3. In addition to the certified question, the following pleadings are also pending before the Commission: (a) Motion to Expedite Consideration of Garden State Broadcasting Limited Partnership's Motion Requesting Withdrawal Of The Presiding Judge, filed October 10, 1989, by WWOR-TV, Inc.; and (b) Response To Motion To Expedite Consideration, filed October 16, 1989, by Garden State Broadcasting Limited Partnership. We will grant WWOR-TV's Motion for Expedited Consideration.

4. In its motion seeking the ALJ's withdrawal, Garden State alleged that its right to a fair and impartial hearing under 5 U.S.C. § 556 of the Administrative Procedure Act was compromised by an extra-record factor, namely the Commission's *Second Further Notice of Inquiry and Notice of Proposed Rule Making in BC Docket No. 81 - 742*, 3 FCC Rcd 5179 (1988), and ensuing actions in the Commission's Rule Making concerning the comparative renewal process (hereafter cited as *Second Notice).* [1] To support its claim of extra-record prejudice, Garden State cited the ALJ's express reliance on the *Second Notice* as a basis for adding the abuse of process, misrepresentation, and financial issues against Garden State in an October 23, 1988 order; alleged inconsistent treatment of Garden State vis-a-vis the renewal applicant in this case in a series of interlocutory rulings; and claimed prejudgment of facts prejudicial to Garden State.

5. In order to justify a request to disqualify the Presiding Judge from an adjudicatory proceeding, a party must demonstrate personal bias or prejudice impairing the Presiding Judge's ability to act in an impartial manner. *See WWOR - TV, Inc.*, 4 FCC Rcd 6155, 6155 ¶ 4 (1989), citing *Berger v. United States*, 255 U.S. 22, 33-35 (1921) ("[affidavits] must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment"). To be disqualifying the alleged bias or prejudice "must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966).

6. As the Commission has explained, "'[u]nfavorable' interlocutory rulings by the ALJ during the hearing may be relevant to a claim of prejudice, but, without further support, they will not afford a basis for disqualifying the ALJ." *See Barnes Enterprises, Inc.*, 66 FCC 2d 499, 501-02 ¶ 6 (1977). The rationale for this is two-fold. First, we presume that our Administrative Law Judges will discharge their duties in a fair and impartial manner, *Barnes*, 66 FCC 2d at 501-02 ¶ 6, and we therefore accord them broad discretion to regulate the course of a comparative hearing. *Hillebrand Broadcasting Inc.*, 1 FCC Rcd 419, 419 ¶ 3 (1987). Second, adverse interlocutory rulings by the ALJ may, pursuant to 47 C.F.R. § 1.276 of the Commission's rules, be appealed after the release of the initial decision, and any error of fact or law may therefore be corrected on review. *Barnes*, 66 FCC 2d at 501-02 ¶ 6. Nevertheless, given the difficulty of establishing an extrajudicial source of bias, the Commission has held that "the comments and rulings of the trier of fact may be

relevant to the existence of prejudice." *WWOR - TV, Inc.*, 4 FCC Rcd at 6155 ¶ 4, citing *KAYE Broadcasting, Inc.*, 35 FCC 2d 548, 548 ¶ 3 (1972).

7. We have reviewed the *Second Notice* and conclude that it is not an extrajudicial source of bias. In addition, pursuant to our holding in *KAYE*, we have reviewed the rulings cited by Garden State to determine whether they evidence prejudice by the ALJ. We have also considered the ALJ's explanation for those rulings, as set forth in his September 29, 1989 ruling declining to withdraw from this case. Based upon our review of these matters, we conclude, for the reasons set forth below, that the ALJ has conducted this proceeding in a fair and even-handed manner and that the actions complained of do not warrant the ALJ's disqualification.

8. Turning first to the ALJ's ruling adding the financial, misrepresentation and abuse of process issues, Garden State objects particularly to the implicit finding that its predecessor, Mainstream, was not a *bona fide* applicant, and to the ALJ's express reliance on the *Second Notice* to support the addition of these issues.[2] Although the ALJ did, as Garden State claims, cite the Commission's *Second Notice*, he explained that the decision to add the issues ultimately turned on his independent analysis of the facts, and not on the policies proposed in the Commission's *Second Notice*. *WWOR - TV, Inc.*, FCC 89M-2368 at ¶ 3. If the ALJ's analysis, including any findings concerning Mainstream, contains errors of fact or of law, those errors may be cured on review. They are therefore not evidence of bias against Garden State. *Barnes*, 66 FCC 2d at 501-02 ¶ 6. Our review of the challenged ruling confirms that the policy concerns reflected in the *Second Notice* were cited only as additional support for adding the issues, and that the facts, standing alone, formed the basis for the ALJ's ruling. Without determining whether the facts support the specification of issues against Garden State, we therefore find that the ALJ's recognition of the policies underlying the *Second Notice* did not deprive Garden State of its right to a fair and impartial hearing on this question.

9. In any event, we agree with the Presiding Judge that the Rule Making does not constitute an "extrajudicial" source that he was required to ignore in order to conduct this adjudicatory proceeding in a fair and even-handed manner. [3] *WWOR - TV, Inc.*, FCC 89M-2369 at 2-3 ¶ 3. We expect decision-making personnel to be aware of changing Commission policy and, where appropriate, to apply such changes in pending cases. In order to implement some of the changes proposed in the *Second Notice* pending final resolution of the Rule Making proceeding, the Commission authorized ALJs to consider requests for abuse issues in individual cases, and provided that such issues would be "preserved for Commission review." *Second Notice*, 3 FCC Rcd at 5197 ¶ 124. Without determining the extent of the ALJ's specific reliance on the *Second Notice* in this case, such reliance by decision-making personnel on Commission policy proposed in the *Second Notice* and adopted in the *First Report and Order* does not, under the circumstances, demonstrate prejudice or bias on the part of the decision-maker.[4]

10. In so holding, we have not considered whether the ALJ has properly applied policies articulated therein. *See* 47 C.F.R. § 1.301 (interlocutory appeals are not permitted unless authorized by the ALJ or the ruling is appealable as a matter of right). Any errors of fact or law may be corrected at the appropriate time. Given this possibility of appeal, a "discontented litigant [may not] oust a judge because of adverse rulings." *See* generally *Webster - Fuller Communications Associates*, 4 FCC Rcd 4952, 4952 ¶ 5 (1989) (citing *Berger*, 255 U.S. at 31).

11. Turning now to the discovery rulings Garden State alleges improperly favor the renewal applicant, we find no evidence of disparate treatment. That the ALJ denied the relief requested by Garden State but granted the relief requested by the renewal applicant is not, without more, evidence of his bias against Garden State. In the absence of other evidence of prejudice or bias, a pattern of unfavorable rulings that are subject to review is not sufficient to overcome the strong presumption that the ALJ has acted in a fair and impartial manner. *See Oswego Broadcasting and Communications*, 56 RR 2d 241, 242 ¶ 4 (1984). *See also Botts v. United States*, 413 F.2d 41, 44 (9th Cir. 1969). Garden State has not adduced other evidence to support its claim of bias.

12. As the Presiding Judge explained in declining to withdraw from this case, each of the contested rulings contains a reasoned analysis of the facts involved. *WWOR-TV, Inc.*, FCC 89M-2368 at 5-6 ¶ 9. The stated rationale for each contested ruling is set forth in the ALJ's September 27, 1989 order denying Garden State's motion, and need not be considered at length here. Without addressing the merits of each discovery ruling, we note that, as a general matter, the nature of the specified issues is not altogether immaterial in ruling on discovery requests. Thus, to the extent that Garden State faults the ALJ for considering the pendency of the abuse of process issue in determining the scope of discovery against Garden State, we do not believe that this demonstrates the ALJ's prejudgment of the abuse issue.

13. Nor does the ALJ's August 25, 1989 ruling permitting the deposition of Garden State's counsel, the law firm of Cohen and Berfield, and two other broadcast clients having no connection with Garden State, show disparate treatment or prejudgment of facts. While conceding that counsel may be deposed on non-privileged matters, Garden State charges that the ALJ has seriously invaded the attorney-client relationship by authorizing WWOR-TV to depose Garden State counsel. Without addressing the merits of this ruling, we find that the ALJ acted in a fair and even-handed manner in permitting the renewal applicant to depose Garden State's counsel on the abuse issue. The ALJ initially refused to permit WWOR-TV to depose Garden State's counsel on the abuse issue, *WWOR - TV, Inc.*, FCC 89M-2368 ¶ 9 (citing *WWOR - TV, Inc.*, FCC 88M-4072 (Nov. 30, 1988)), and permitted the depositions only after entertaining arguments from both sides. And, the ALJ, based on Garden State's objections, substantially narrowed the scope of the discovery that he eventually allowed. *WWOR - TV, Inc.*, FCC 89M-2368 at ¶ 13. That the discovery was still broader in scope than what Garden State would have liked does not demonstrate improper prejudgment by the ALJ. Even assuming that the scope of discovery was broader than what the record warrants, any errors of fact or law can be cured on review.

14. In permitting the attorneys' depositions, the ALJ relied on evidence that attorneys Lewis Cohen and Morton Berfield assumed an unspecified role in Garden State following the illness and subsequent death of one of its principals. *WWOR - TV, Inc.*, FCC 89M-2163 ¶¶ 4, 7 (released August 25, 1989). Notwithstanding Garden State's contention that the ALJ relied on a single snippet of deposition testimony, the ALJ cited several factors sup-

porting his decision to allow the deposition. *WWOR - TV, Inc.*, FCC 89M- 2368 ¶¶ at 13-14 (citing FCC 89M-2163 at ¶¶ 4, 8). Thus, the ALJ's order does not support Garden State's further claim that the ALJ prejudged the issue of the attorneys' involvement in the applicant. The rationale for deposing other clients represented by the law firm of Cohen and Berfield, as well as Mainstream principals, is less clearly articulated in the ALJ's ruling. However, the ALJ enjoys broad discretion over the conduct of an evidentiary hearing. *Hillebrand*, 1 FCC Rcd at 419 ¶ 3. The circumstances in this case do not establish that the ALJ has abused his discretion.[5]

15. Nor does the ALJ's refusal to permit Garden State to depose WWOR-TV's counsel demonstrate that the decision allowing the deposition of Garden State's attorney was the result of bias against the renewal challenger. It appears that the ALJ refused to allow the deposition of WWOR-TV's counsel because he found that Garden State had not overcome privilege claims. FCC 88M-4214 (December 8, 1988). And, as the ALJ noted in refusing to withdraw from this proceeding, there was no abuse of process issue or settlement pay-off concerning WWOR-TV's counsel that would make it appropriate to depose them on non-privileged matters. *WWOR - TV, Inc.*, 89M-2368 at ¶ 9. Our review confirms that the ALJ's ruling denying Garden State's request to depose WWOR-TV's legal counsel was based on the factual circumstances of this case and contains no overt evidence of bias in favor of the renewal applicant. Because the ALJ appears to have acted in a fair and even-handed manner, and because any error of fact or law in the challenged rulings may be corrected on review, we conclude that these rulings do not demonstrate inconsistent treatment or prejudgment of issues by the ALJ. It is therefore premature for us to consider whether, as a matter of law, the scope of discovery permitted on the abuse issue was too broad.

16. In deferring consideration of the merits of these rulings until after the initial decision, we cast no aspersions on Garden State's motives in filing its withdrawal motion. Garden State complains of comments by the ALJ suggesting that the withdrawal motion was filed to obtain an unauthorized interlocutory appeal and to avoid complying with discovery. That Garden State's motion effectively requests interlocutory review of rulings that would otherwise not be reviewable until after the initial decision does not, as the ALJ appears to suggest, establish that the motion was filed in order to obtain such review or that Garden State's motive in filing the motion was improper. Nor is there any indication that Garden State, which has already responded to substantial discovery requests, filed its withdrawal motion in order to defer compliance with discovery.

17. We accept as genuine Garden State's concern that its right to a fair and impartial hearing might be compromised by extra-record prejudice. We also accept its explanation that the ALJ's determination to allow the renewal applicant to depose Messrs. Cohen and Berfield ultimately convinced Garden State to seek the withdrawal of this ALJ. While we are concerned with the delay that such motions cause, the previous delay occasioned by Whitely's earlier motion to disqualify the ALJ has no bearing on the merits of Garden State's motion requesting the ALJ's withdrawal. To the extent that the ALJ suggests otherwise (FCC 89M-2368 at ¶ 15), his comments are unfortunate. Notwithstanding Garden State's contentions, however, we do not find that these comments establish prejudgment of the issues by the ALJ or otherwise demonstrate the "bent of mind" favoring the renewal applicant that would require the ALJ's withdrawal from this proceeding. *See Berger v. United States*, 255 U.S. at 33-35.

18. ACCORDINGLY, IT IS ORDERED, That the Exceptions, filed on October 5, 1989, by Garden State Broadcasting Limited Partnership ARE DENIED; and that the Memorandum Opinion and Order (FCC 89M-2368, released September 29, 1989) of Administrative Law Judge Richard L. Sippel denying Garden State's Motion And Supporting Declaration Under Penalty Of Perjury Requesting Withdrawal Of The Presiding Judge IS AFFIRMED.

19. IT IS FURTHER ORDERED, That the Motion to Expedite Consideration of Garden State Broadcasting Limited Partnership's Motion Requesting Withdrawal Of The Presiding Judge, filed October 10, 1989, by WWOR-TV, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See First Report and Order*, 4 FCC Rcd 4780 (1989); *Third Further Notice of Inquiry and Notice of Proposed Rule Making*, 4 FCC Rcd 6363 (1989).

[2] Mainstream, under the direction of its sole general partner, Jean Wells, sought to apply for station WWOR-TV, then licensed to RKO General, Inc. Mainstream's application was rejected and it ultimately was paid more than $5,000,000 by RKO to dismiss its court appeal. Wells is now general partner and 4 percent owner of Garden State, which has retained the same attorneys who represented Mainstream in the RKO settlement agreement.

[3] The Commission did not, by initiating a Rule Making to explore possible abuse by renewal challengers, prejudge the *bona fides* of Garden State's application or that filed by any particular renewal challenger. Therefore, neither the *Second Notice* nor the ongoing Rule Making is sufficient, standing alone, to require the disqualification of the Commission or any of its decision-making personnel from resolving this adjudicatory proceeding. Cf. *FTC v. Cement Institute*, 333 U.S. 683, 700-03 (1948) (the FTC, having informed Congress of its view that industry-wide use of basing point system was illegal, was nonetheless free to adjudicate the legality of respondents' basing point practices since it had made no finding that respondents' practices were an illegal restraint of trade). To the extent that Garden State challenges the policies that it purports to find in the Rule Making, the ongoing Rule Making proceeding, rather than this adjudicatory proceeding, is the appropriate forum for Garden State to raise such arguments.

[4] As the ALJ noted, the Commission's abuse concerns did not originate with the *Second Notice*. *See WWOR - TV, Inc.*, FCC 89M-2368 at 6-7 ¶ 10. Accord *WWOR - TV, Inc.*, 3 FCC Rcd 7175, 7175 ¶ 3 (Rev. Bd. 1988), citing *Gulf Coast Communications, Inc.*, 81 FCC 2d 499, 509-16 (Rev. Bd. 1980), review denied, FCC 82-128 (1982), aff'd per curiam, No. 82-1760 (D.C. Cir. 1983) (noting that the Commission's concern with preventing abuse of its processes did not originate with the *Second*

Notice, the Board refused to permit an interlocutory appeal of the ALJ's ruling adding the abuse of process issue against Garden State). Indeed, the concern that applications not be filed for the purpose of entering into or carrying out a settlement agreement stems directly from the Communications Act. *See* 47 U.S.C. § 311(d), which governs agreements in comparative renewal proceedings ("the Commission shall approve the agreement only if it determines that . . . no party to the agreement filed its application for the purpose of reaching or carrying out such agreement").

[5] To the extent that Garden State complains that the ALJ has been more lenient in granting extensions of time to WWOR-TV than to Garden State, we would not attempt to second-guess the ALJ's efforts to regulate the course of the proceeding in this manner. Thus, this alleged disparity, standing alone, does not demonstrate the ALJ's bias in favor of the incumbent licensee.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM DOCKET NO. 85-397

In re Application of

KOZN FM STEREO 99 LTD.,
Debtor in Possession.

Licensee of Radio Station KOZN-FM
Imperial, California

Order to Show Cause why The License
Of KOZN-FM, Imperial, California
Should Not Be Revoked

MEMORANDUM OPINION AND ORDER

Adopted: April 20, 1990; Released: May 3, 1990

By the Commission:

1. The Commission has before it a Petition for Extraordinary Relief filed December 27, 1989, by the Trustee in Bankruptcy for Stereo 99, Ltd, licensee of radio station KOZN(FM). The petition seeks permission to assign the license for KOZN(FM) to New World Communications, Inc.[1] We will grant the requested relief.

BACKGROUND

2. On December 24, 1985, the Commission issued an Order to Show Cause why the license of KOZN(FM) should not be revoked. The Commission had evidence before it suggesting that Richard Green, the sole general partner of Stereo 99, Ltd. (Stereo), had falsified information regarding his citizenship on his license application. After the case had been designated for hearing, Stereo filed for Chapter 11 relief in the United States Bankruptcy Court, Southern District of California, Case No. 88-04080-B11. The Bankruptcy Court appointed Kenneth C. Henry Bankruptcy Trustee for Stereo. The Trustee participated in a pre-hearing conference before the presiding administrative law judge at the Commission on June 20, 1989.[2] At the conference, the ALJ gave the Trustee until August 31, 1989, to find a qualified buyer. Otherwise, the Trustee was to tender the license back to the Commission. *See Order*, FCC 89MM-1714, released June 22, 1989.

3. The Trustee executed a sales contract with New World Communications (New World) on August 21, 1989. The bankruptcy court subsequently issued an Order approving the sale and the terms of the purchase agreement. The purchase agreement provides for the payment of $255,000 to Stereo by New World. The proceeds from the sale of Stereo's assets and assignment of license to New World will be applied to the administrative costs of the bankruptcy and the satisfaction of creditors' claims. The estimated total of all claims is $257,057.94, including unsecured creditor claims of $116,442.77.

DISCUSSION

4. In the Petition for Extraordinary Relief, the Trustee requests permission to assign the license of KOZN-FM pursuant to the policy enunciated in *Second Thursday Corp.*, 22 FCC 2d 515, recon. granted, 25 FCC 2d 112 (1970). The *Second Thursday* policy is an exception to the rule that a licensee may not freely transfer its station while there are unresolved questions concerning its qualifications to be a licensee. Under *Second Thursday*, a bankrupt licensee, whose character qualifications are in hearing, may transfer its station license if:

> . . . the individuals charged with misconduct will have no part in the proposed operations and will either derive no benefit from favorable action on the [assignment] application[] or only a minor benefit which is outweighed by equitable considerations in favor of innocent creditors. [citations omitted]

22 FCC 2d at 516 ¶ 5. Thus, the *Second Thursday* policy "accomodates the policies of the federal bankruptcy law with those of the Communications Act." *La Rose v. FCC*, 494 F.2d 1145, 1147 n.2 (D.C. Cir. 1974).

5. The Mass Media Bureau, in its comments on the Trustee's petition, noted that because Stereo's sole general partner would not participate in the future operation of KOZN, the first prong of the *Second Thursday* test was satisfied. Addressing the second prong of the test, which involves balancing the benefits to the alleged wrongdoer and the benefits to innocent creditors, the Bureau observed that Stereo's general partner would be secondarily liable for the debts of the partnership. The Bureau concluded that any indirect benefit of relieving the general partner of possible liability was outweighed by the benefit to innocent creditors. However, the Bureau was troubled by the possibility that the general partner could benefit directly from the sale if, after the final adjudication of the claims, the allowable claims were less than the purchase price. Because the purchase price of the proposed sale of $255,000 is only slightly less than the total amount of Stereo's debts, the Bureau was concerned that if some of the unsecured creditors did not file their claims or if the bankruptcy court denied any of the claims, it was possible that some money could revert back to the general partner after the payment of all lawful claims. The Bureau suggested that this impediment could be cured if the general partner waived all rights to receive any proceeds from the sale of KOZN. *See Comments*, ¶ 11.

6. In response, the Trustee filed a Supplement to Petition for Extraordinary Relief reporting that the bankruptcy court had approved modification of the sales agreement. Under the new terms, any excess funds from the sale will be held in a blocked account subject to the determination of the FCC and the bankruptcy court as to how the funds should be appropriated. The Mass Media Bureau commented favorably on the supplemental proposal.

7. We agree with the Bureau that the proposed assignment is consistent with our *Second Thursday* policy. Richard Green, Stereo's general partner, and the only

person charged with misconduct in this proceeding, will have no part in the future operation of the station once New World assumes control. *See Comments*, ¶ 7. Moreover, Green will receive no more than an incidental benefit from the sale in the elimination of his potential secondary liability. The Bureau was rightly concerned about the possibility that Green could directly benefit from the sale unless the agreement contained a provision prohibiting him from receiving any of the proceeds. Because the sale price is only two thousand dollars less than the potential claims, it is almost certain that some money will be left over unless the bankruptcy court approves one hundred percent of the claims. As the Bureau points out, the unsecured claims total over $116,000, and at least some of those claims are likely to be invalid and others may not be timely filed. *Id.* ¶¶ 9-10. The sales agreement, as modified, will preclude any direct benefit to Green by placing any excess funds in a blocked account pending application of the other partners to the Commission to receive those funds. If the Mass Media Bureau, pursuant to authority hereby delegated, does not approve payment to the other partners, the funds will be disbursed by the Trustee to the buyer or as otherwise directed by the bankruptcy court. Under no circumstances will any funds from the sale be paid to Mr. Green.

8. The facts of this case justify the application of the *Second Thursday* policy. As presently structured, the current licensee's general partner will receive only an incidental benefit from the sale through the elimination of his potential secondary liability. The innocent creditors may well be paid in full. Under these circumstances, we will grant the petition for extraordinary relief. [3]

9. ACCORDINGLY, IT IS ORDERED, That the Petition for Extraordinary Relief, filed December 27, 1989, by the Trustee in Bankruptcy for KOZN(FM) Stereo 99, Ltd, as amended by the Supplement to Petition for Extraordinary Relief filed on January 31, 1990, IS GRANTED.

10. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED, provided that if the application for assignment from the Bankrupty Trustee to New World Communications, Inc. is denied, or the assignment to New World Communications, Inc., is not consumated, the action taken herein shall be void.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Also before the Commission are Comments filed by the Mass Media Bureau on January 10, 1990; a Supplemental Petition for Extraordinary Relief filed by the Trustee on January 25, 1990, and Comments on the Supplemental Petition for Extraordinary Relief filed by the Mass Media Bureau on January 31, 1990.

[2] Stereo had previously sought to avail itself of the Commission's minority distress sale policy. The Commission did, in fact, approve a proposed sale by Stereo prior to the latter declaring bankruptcy. *See* Memorandum Opinion and Order released on February 25, 1988. *KOZN FM Stereo 99, Ltd.*, 3 FCC Rcd 877 (MM Bureau 1988). The sale was never consumated.

[3] An application to assign the license of KOZN(FM) to New World Communications, Inc. (BPH-891026HH), filed by the Trustee on October 26, 1989, is pending before the Mass Media Bureau. Because the Bureau has not yet passed on New World's qualifications to be a licensee, we will terminate this proceeding conditioned on the approval of the assignment application and the consummation of the assignment to New World.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of:

TEXAS MEDIA GROUP, INC.
South Padre Island, Texas
Channel 237A — File No. BPH-850712R7

TREY BROADCAST COMMUNICATIONS, INC.
Beeville, Texas
Channel 250A — File No. BPH-860918NW

For a Construction Permit for a New FM Station

MEMORANDUM OPINION AND ORDER

Adopted: April 9, 1990; Released: May 3, 1990

By the Commission:

1. The Commission has under consideration: (i) an Application for Review[1] of the return of an application for a new commercial FM station at South Padre Island, Texas filed by Texas Media Group, Inc. ("Texas"); (ii) a Joint Motion For Extension Of Time filed on behalf of Rio Bravo, Ltd. ("Bravo") and Susan Lundborg ("Lundborg"), mutually exclusive applicants for a new FM station in South Padre Island, Texas; (iii) a Joint Opposition to the Texas Application for Review filed by Bravo and Lundborg; and (iv) a Reply to Opposition filed by Texas. Also under consideration are: (i) an Application for Review of the return of the subject application for a new FM station filed by Trey Broadcast Communications, Inc. ("Trey"); (ii) an Opposition to Application for Review filed by Harmon Broadcasting Corp., permittee of a new FM station at Beeville, Texas; and (iii) a Reply to Opposition filed by Trey. Because the legal issues and discussion presented in the Texas and Trey applications and pleadings are virtually identical, the Applications for Review will be consolidated.

2. Texas and Trey filed their applications on July 12, 1985 and September 18, 1986, respectively. On March 27, 1986 and March 16, 1987, respectively, the Chief, FM Branch, returned both applications as unacceptable for filing because the facilities specified exceeded the maximum height above average terrain ("HAAT") for Class A Stations within 199 miles (320 kilometers) of the Mexican border, in violation of the 1972 Agreement Between the United States of America and the United Mexican States Concerning Frequency Modulation Broadcasting in the 88 to 108 MHz Band ("U.S. - Mexican Agreement" or "Agreement"). Article 5 of the U.S. - Mexican Agreement limits Class A stations to an effective radiated power ("ERP") of 3 kilowatts at 300 feet HAAT, or an equivalent thereof. Texas's application proposed an ERP of 3.0 kilowatts at 328 feet HAAT and Trey's application proposed an ERP of 3.0 kilowatts at 304 feet HAAT.

3. In their respective petitions for reconsideration Texas and Trey essentially advanced the following arguments: (1) the Commission erred in returning the applications because the Commission did not give proper notice of the HAAT and ERP restrictions contained in the Mexican Treaty; and (2) the dismissal of the applications is at variance with established application processing procedures and is fundamentally unfair, and that at a seminar conducted by Commission staff it was specifically stated that compliance with international requirements is a matter of grantability, not acceptability, which would thus permit a conforming amendment. In addition, Trey contends that the difference between the proposed facilities in its application and the maximum permitted facilities under the Mexican Treaty is *de minimis*; hence, its application could be brought into compliance with the Treaty.

4. The Chief, Audio Services Division, denied the Texas petition for reconsideration, *Susan Lundborg*, 3 FCC Rcd 1 (1988), and denied the Trey petition by letter to Trey Broadcast Communications, Inc. dated May 13, 1988. In denying both petitions, the Chief stated that in *Kerrville Radio, A Limited Partnership*, 2 FCC Rcd 3441 (1987), the Commission denied similar appeals concerning noncompliance with the requirements of the U.S.- Mexican Agreement. In *Kerrville*, the Commission held that: (i) the *Report and Order* in BC Docket 80-90, 48 Fed. Reg. 29486, 29499 (1983), warned applicants within 320 kilometers of the Mexican border that Class A facilities must conform to the Agreement's 300-foot maximum; (ii) there are references to the Mexican and Canadian Agreements in both the rules (47 C.F.R. §§ 73.204 and 73.1650) and in the revision in the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19946 (1985) (Appendix D); (iii) "full and explicit notice" of the requirement for continued adherence to the terms of the U.S. - Mexican Agreement was provided; and (iv) the return of petitioners' applications as unacceptable for filing was based on continuing standards specified in the U.S. - Mexican Agreement. In response to the petitioners' claims of being penalized for their reliance on comments made by a Commission staff member, the Chief noted that it has been our long standing policy to hold applicants themselves responsible for compliance with our rules and to reject all efforts to shift responsibility to others, citing *United Public Broadcasting Co., Inc.*, 57 RR 2d 1605, 1606 (1985). Because we do not have the authority to waive any treaty provision, the Chief held that reference to the *de minimis* nature of the violation is not germane, citing *LNJ Communications*, 2 FCC 2cd 6072 (1987).

5. In their respective applications for review, both Texas and Trey assert that *Kerrville* fails to address adequately the arguments presented in their petitions. Texas and Trey continue to assert that they lacked adequate notice of the provisions of the U.S. - Mexican Agreement. Specifically, Texas argues that the Commission failed to advise applicants in any rules, policy statements or previous pronouncements that there were any substantial limitations to the "otherwise plain language" of 47 C.F.R. § 73.211. Trey also claims that the return of its application was improper because neither the U.S. - Mexican Agreement nor the ERP or HAAT restrictions contained therein have ever been published in the Federal Register in accordance with the Administrative Procedure Act ("APA"), and that

restrictions agreed to in international treaties must be adopted in the Commission's Rules before they can be enforced. Additionally, Texas and Trey argue that noncompliance with the Agreement is not an acceptability defect but rather a grantability defect for which an amendment should be permitted, and that the Commission failed to abide by a staff member's public statement that it is application processing policy that compliance with international treaties is a criteria of grantability, not acceptability. Texas maintains that the Commission's Rules contain no indication that the provisions of the U.S. - Mexican Agreement are acceptance criteria. Trey maintains that the variance in its HAAT is *de minimis* which should be a factor in allowing it to file a curative amendment.

6. The Commission is not required to publish an international agreement or treaty in the Federal Register or incorporate such agreement or treaty into its rules before it can require applicants to comply with its terms. *See Kerr County Broadcasting*, 4 FCC Rcd 5021 (1989); *cf. WBEN v. United States*, 396 F.2d 601, 616 (9th Cir. 1968) (advance notice not required before entry into treaty negotiations); 5 U.S.C. § 552 (requiring agency rules to be published). As we pointed out in *Kerr County*, under the Constitution the Agreement takes precedence over the Commission's rules and the Commission has no power or authority to waive, modify or alter the terms thereof. Here, however, the parties did in fact have notice of the U.S. - Mexican Agreement. Among the general powers of the Commission enumerated in 47 U.S.C. § 303 is the power to make rules and regulations necessary to carry out the provisions of any international treaty. *See* 47 U.S.C. § 303(r). The Commission exercised this power in adopting and publishing in the Federal Register, 47 C.F.R. § 73.1650, which explicitly states that the U.S. is a signatory to an agreement with Mexico concerning FM Broadcast stations and indicates where that agreement may be inspected or how it may be obtained. *See* 43 Fed. Reg. 45842 (1978) (adopting § 73.1650). *See also* 47 C.F.R. § 73.204 ("International Agreements and other restrictions on use of channels") (cross-referencing Section 73.1650), 49 Fed. Reg. 10264 (1984) (adopting § 73.204). In so doing, the Commission put all applicants on notice regarding the agreement. *Kerr County* at 5022. Further notice was provided in the *Report and Order* in MM Docket 80-90, 48 Fed. Reg. 29486, 29499 (1983) and the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19946 (1985) (Appendix D). The fact that the Agreement was not separately referenced in yet another provision of the Commission's rules (47 C.F.R. § 73.211) is irrelevant.

7. Additionally, Texas and Trey further argue that noncompliance with provisions in the Agreement is not an acceptability defect but rather a grantability defect for which an amendment to bring it into compliance with the Agreement should be permitted. Texas maintains that the Commission's Rules contain no indication that the provisions of the U.S. - Mexican Agreement are acceptance criteria.

8. In discussing the elements evaluated in the course of an acceptability study under the "hard look" FM processing procedures adopted in the *Report and Order* in MM Docket 84-750, the Commission explicitly stated that "[i]nternational agreements also influence permissible ERP levels in border areas" and that "antenna height is also limited in certain cases by international treaty." 50 Fed. Reg. at 19946 (Appendix D). *See also Educational FM Channel Assignment*, 43 RR 2d 1189, 1191 (1978). We do not believe, as Texas suggests, that failure to delineate the "certain areas" in which HAAT is limited by international agreement precludes return of an application as unacceptable for filing when the HAAT exceeds the limitations of an international agreement, particularly here where it is obvious that South Padre Island, Texas is a border community with Mexico or, at a minimum, is within a border area. On the contrary, having explicitly notified applicants that ERP and HAAT are evaluated in the course of an acceptability study and that ERP and HAAT may, in some cases, be limited by international agreements and, having provided explicit notice of those agreements, applicants are on notice that compliance with the ERP and HAAT limitations set forth in an international agreement is necessary to finding that an application is acceptable for filing. *See Kerr County*, 4 FCC Rcd. at 5022; *see also*, *Domega Broadcasting Corp.*, 4 FCC Rcd 1450 (1989). It is also well established that amendments addressing the acceptability of an FM application are not permitted beyond expiration of the 30-day period triggered by a Public Notice announcing that the application has been accepted for tender, regardless of how minor or *de minimis* they are. *See Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936, 19941 (1985). Texas and Trey again assert that because a member of the staff stated that compliance with international treaties was a grantability criteria (for which an amendment would be allowed or an issue specified in a Hearing Designation Order), petitioners are entitled to rely on that representation and should be permitted to amend their applications to correct the deficiency. The Commission having properly notified applicants that compliance with the HAAT limitations in the U.S. - Mexican Agreement will be evaluated as an acceptability criteria, statements to the contrary by members of the staff do not warrant acceptance of a late filed amendment to cure an acceptability defect. It is the obligation of interested parties to ascertain facts from offical Commission records and files and not rely on statements or informal opinions by the staff. *See Kerr County*, *supra.* at 5022, *220 Television, Inc.*, 81 FCC 2d 575 (1980); *Camelot, Inc.*, 61 FCC 2d 15, 38 RR 2d 620 (1976). A staff presentation at a seminar does not involve the official decisionmaking process of the Commission nor is it based upon any delegated decisionmaking authority. As such, it is no more than a staff member's informal opinion and carries no precedential weight.

9. Accordingly, for the foregoing reasons, the Applications for Review filed by Texas and Trey ARE HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] The pleading Texas filed in response to the denial of its petition for reconsideration was styled "Second Petition for Reconsideration and Acceptance Nunc Pro Tunc." In accordance with Texas' request in Footnote 1 of its pleading, it will be treated as an application for review.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

DAVID W. FREEMAN, SR., et al. File No. BPH-870327MM

For modification of license for
WKLG(FM), Rock Harbor, Florida

MEMORANDUM OPINION AND ORDER

Adopted: April 16, 1990; Released: May 3, 1990

By the Commission:

1. The Commission has before it: (i) an April 13, 1989 petition for reconsideration of its denial of an informal objection[1] filed by Intercoastal Broadcasting, Inc.,[2] licensee of WMXJ(FM), Pompano Beach, Florida ("WMXJ"), against the above-captioned application for modification of license filed by David W. Freeman. Sr., et al., licensee of WKLG(FM), Rock Harbor, Florida ("WKLG"); (ii) Opposition to petition for reconsideration filed by WKLG on April 27, 1989 and (iii) Reply to opposition filed by WMXJ on May 8, 1989.

2. WMXJ, in its informal objection, claimed that WKLG's application for modification, to upgrade from Channel 272A to Channel 271C2 at its Rock Harbor site, violated a site restriction imposed by the Commission in *Report and Order* in MM Docket 85-372, 51 Fed. Reg. 35515, (1986)(" *R & O* "). In so doing, WMXJ contended, WKLG will create a short-spacing of 5.3 kilometers to WMXJ's Coral Gables facilities that would otherwise not exist if WKLG specifies a site complying with the *R & O*. Consequently, WMXJ asserted, grant of WKLG's modification application would contravene the public interest as defined in *Carroll - Harrison Broadcasting*, 62 FCC 2d 45 (1976), *recon. denied*, 67 FCC 2d 254 (1977).

3. In denying the objection, we noted that the 22.4 kilometer site restriction, which was imposed solely to protect the Class C "buffer zone" of WLYF in Miami, was no longer necessary after March 2, 1987. [3] We concluded that WKLG's March 27, 1987 modification application does not create, but rather maintains, the 5.3 kilometer short-spacing to WMXJ initially created in relocating WMXJ's transmitter to its present site. The Commission also stated that the precedent cited by WMXJ which refers to the sufficiency of a request for waiver of the minimum spacing requirements where short-spacing is either created or increased, has no applicability to cases where, as here, a waiver has already been deemed in the public interest and the existing short-spacing is merely maintained.

4. In its petition for reconsideration, WMXJ asserts that the Commission erred by failing to rule on two of WMXJ's three principal arguments against granting WKLG's application. First, WMXJ contends that WKLG's March 27, 1987 upgrade application constituted a deliberate breach of faith with the Commission by ignoring the 22.4-kilometer site restriction and instead specifying its present transmitter site as the upgrade location. Secondly, WMXJ alleges that WKLG, by undertaking in Comments filed in MM Docket No. 85-372 to accept the site restriction when it was aware of the impending disappearance of the "buffer zone" for Station WLYF(FM), thus displayed a lack of candor with the Commission since WKLG never intended to relocate to the site restricted area.

5. Stipulated in the *R & O* that amended the FM Table of Allotments to enable WKLG to operate on Channel 271C2 was a condition that

> [t]he transmitter site must be restricted to an area at least 22.4 kilometers (13 miles) southwest of the city to meet the spacing requirements to station WYLF(FM), Channel 268, Miami, Florida. Channel 271C2 is not available for use at the present site for station WKLG due to the buffer zone protection for station WLYF(FM), Miami, Florida.

51 Fed. Reg. 35515.

We believe it is implicit in the foregoing condition that WKLG was not required to adhere to the site restriction *if* WLYF did not upgrade by March 2, 1987. The WLYF buffer zone was the only impediment to WKLG's upgrading at its existing site. When the buffer zone disappeared the very basis for the site restriction no longer existed. WKLG's alleged awareness in 1985 of the "impending" disappearance of the buffer zone in 1987 did not constitute lack of candor since, at that point in time, there existed the possibility that WYLF might subsequently upgrade to a full Class C facility at a location that would require WKLG's adherence to the specified site restriction. Accordingly, WMXJ's allegation of lack of candor on the part of WKLG is groundless.

6. Finally, we note that in an application filed January 10, 1986, WMXJ (then owned by Sconnix Broadcasting Company II) proposed to, among other things, change transmitter location. This proposal created a short-spacing of 5.3 kilometers with WKLG, so a waiver request was included in the application. Both the application and the waiver request were granted on January 24, 1986. In its petition for reconsideration, WMXJ again argues that since its earlier shortspacing waiver was essentially predicated on the "assumption" that WKLG would re-locate in accordance with the site restriction it had accepted and that the shortspacing thus would ultimately disappear, the Commission should therefore analyze WKLG's present shortspacing waiver request as if WKLG had adhered to its original site restriction pledge. In that case, WMXJ argues, the short-lived shortspacing between WMXJ and WKLG would have ended, and WKLG's present upgrade application would thus create "new" shortspacing. We disagree. The Commission's grant of the WMXJ shortspacing waiver was not predicated on WKLG changing sites. Therefore, the pre-existing 5.3 kilometer shortspacing is clearly a maintenance of the *status quo*.

7. Accordingly, for the reasons stated herein, IT IS ORDERED, That Intercoastal Broadcasting, Inc.'s petition for reconsideration IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Tampa Bay Broadcasting, Inc.*, 4 FCC Rcd 2294 (1989).

[2] Formerly, Tampa Bay Broadcasting, Inc.

[3] On March 2, 1987, the buffer zone protection afforded Class C facilities pursuant to BC Docket 80-90 expired and those stations that failed to meet the minimum facilities for a full Class C operation were automatically downgraded to a classification reflecting their licensed facilities. *See Report and Order* in BC Docket No. 80-90, 94 FCC 2d 152 (1983); *Memorandum Opinion and Order* (reconsideration) in BC Docket No. 80-90, 49 Fed. Reg. 10260, (1984); *Public Notice* "Reclassification of FM Facilities Pursuant to BC Docket 80-90," 2 FCC Rcd 2124 (1987). Among those stations downgraded was WLYF(FM), Miami, Florida. Because this downgrade effectively reduced the minimum separation requirement between WLYF(FM) and WKLG(FM), the need for the 22.4 kilometer site restriction originally imposed upon WKLG(FM) in the channel substitution and license modification proceeding was no longer necessary. This fact subsequently was formally recognized in *Memorandum Opinion and Order* (reconsideration) in MM Docket 85-372, 3 FCC Rcd 587 (MM Bur. 1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-304

In re Applications of

REBECCA L. BOEDKER File No. BPH-870827ML

WILLIAM PHILLIP ZURICK File No. BPH-870827MN

For Construction Permit for a
New FM Station, Channel 297A,
Northumberland, Pennsylvania

Appearances

Bruce A. Eisen, Esq., on behalf of Rebecca L. Boedker; *William H. Crispin* and *Dean R. Brenner, Esqs.*, on behalf of William Phillip Zurick.

DECISION

Adopted: April 23, 1990; Released: May 4, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Member ESBENSEN:

1. Before the Review Board is the *Initial Decision*, 4 FCC Rcd 8328 (1989)(I.D.) of Acting Chief Administrative Law Judge James F. Tierney (ALJ) and the exceptions (and replies thereto) filed by both applicants. Having reviewed the foregoing, as well as the record below, and having heard oral argument on March 30, 1990, we affirm the ALJ's disqualification of Rebecca L. Boedker (Boedker), as modified herein, and grant the application of William Phillip Zurick (Zurick).

BACKGROUND

2. The *Hearing Designation Order*, 3 FCC Rcd 4059 (1988)(HDO) in this proceeding originally designated three applicants for consolidated hearing. One applicant, pursuant to an approved settlement agreement with Zurick, dismissed its application (*see Memorandum Opinion and Order*, FCC 89M-2201, released September 1, 1989). In addition to the standard comparative issues, Zurick had an "air hazard" issue designated with respect to his application (which was favorably resolved by *Memorandum Opinion and Order*, FCC 89M-310, released January 30, 1989). However, before proceeding to hearing, the ALJ added numerous basic qualifying issues against Boedker.

3. By *Memorandum Opinion and Order*, FCC 88M-4360, released December 23, 1988, the following issues were added against Boedker (I.D., para. 2):

> [1] To determine whether Boedker violated Section 311(e)(3)(b) of the Communications Act of 1934, as amended, or Rule 73.3525 (47 CFR 73.3525) by filing an application for a construction permit with the sole purpose of receiving a monetary settlement.
>
> [2] To determine whether under the evidence adduced under [1] above, Boedker engaged in an abuse of process.

4. By *Memorandum Opinion and Order*, FCC 89M-719, released March 6, 1989, the ALJ added the following additional issues against Boedker (I.D., para. 3):

> [3] To determine whether Boedker failed properly to disclose or made a misrepresentation to the Commission concerning the financial involvement of her husband, Jens Erik Boedker, in her application.
>
> [4] To determine whether the involvement of Jens Erik Boedker, a citizen of Denmark, in the application of his wife, Rebecca Boedker, constitutes a violation of Section 310(b) of the Communications Act of 1934, as amended.
>
> [5] Whether under the evidence adduced under [3] and [4], Boedker is qualified to be a Commission licensee.

5. And, by *Memorandum Opinion and Order*, FCC 89M-1054, released April 3, 1989, the ALJ added a final issue against Boedker (I.D., para. 4):

> [6] Whether Boedker falsely certified and misrepresented facts to the Commission concerning her financial qualifications to build and operate a radio station at Northumberland, Pennsylvania, and under the evidence adduced thereunder, whether Boedker is qualified to be a Commission licensee.

6. The ALJ ultimately concluded that (renumbered) Issues 1 and 2 should be resolved in Boedker's favor (*see* I.D., at paras. 57-65), but concluded that the evidence of record with respect to Issues 3-5 demonstrated that Boedker should be disqualified (*see* I.D., at paras. 66-68). With respect to the financial issue (Issue 6), the ALJ made extensive findings, but did not set forth the required conclusions of law. *See* 47 C.F.R. §1.267(b). It is to this latter issue that we turn first.

BOEDKER'S FINANCIAL QUALIFICATIONS

7. The ALJ found that Boedker, an individual applicant, affirmatively certified that she had reasonable assurance of funds available to her at the time she filed her application (FCC Form 301, executed August 24, 1987); that is, she certified that she had sufficient net liquid assets on hand, or available funds from committed sources, to construct and operate her proposed facilities for three months without reliance on revenue (Tr. 131). In so certifying, Boedker relied exclusively on a $250,000 bank letter from the Commonwealth Bank and Trust Company, N.A., Lewisburg, Pennsylvania, dated August 12, 1987, executed by Ross M. Chrisman, a bank officer (*see* Zurick Exh. 5), for her source of funds (Tr. 132).

8. This August 12 letter, in pertinent part, stated as follows (*id.*, emphases added):

> Please be advised that the Commonwealth Bank and Trust Company, N.A. *has an interest* in extending a loan request to your company in the amount of up to Two Hundred and Fifty Thousand Dollars ($250,000) . . . . Our willingness to extend the requested loan is subject to the following:
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> * * *
>
> Our satisfactory review of your financial condition and confirmation that there has been no adverse change in your company's or guarantor's financial condition.
>
> * * *
>
> This letter, of course, *is not a commitment but rather an expression of interest* in the project and *a tentative plan* of structuring the financing based upon the information provided.

9. The record reveals that Chrisman had also initially executed a similar letter to Boedker two days earlier (on August 10, 1987) in the amount of $100,000. This initial letter included the following language (Zurick Exh. 3; emphases added):

> This letter will affirm the willingness of Commonwealth Bank and Trust Company, N.A. *to entertain a loan request* from your company in the amount of up to One Hundred Thousand Dollars ($100,000) . . . .Our willingness *to entertain* the requested loan is subject to the following:
>
> * * *
>
> Our satisfactory review of your financial condition and confirmation that there has been no adverse change in your Company's or guarantors financial condition.
>
> * * *
>
> Please be advised that this is *not* [emphasis in original] a formal commitment but a proposal on how Commonwealth Bank may structure such a loan transaction.

10. The circumstances leading to Boedker's obtaining these letters are as follows: Boedker first approached two local banks for the purpose of securing a bank letter to substantiate her financial qualifications and provide the requisite reasonable assurance; however, she was unable to secure from either institution any letter whatsoever (Tr. 132). She then made an appointment with Chrisman and went to the Commonwealth Bank (Tr. 47) for an initial discussion. Boedker returned to the bank on August 9 or 10, 1987, for another meeting with Chrisman, this time armed with a "sample" bank letter (which purportedly contained language that would satisfy FCC financial requirements) and a related memo from her counsel (*see* Zurick Exh. 3, at 2-3). Chrisman's testimony at hearing illuminates the events of this meeting (Tr. 52-54; emphases added):

> [Zurick Counsel]: Now, at this second meeting . . . did Mrs. Boedker ask you to sign the sample bank loan letter?
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> [Chrisman]: She asked if I would put this sample bank letter on our letterhead and return that to her for submission with her application.
>
> [Counsel]: And how much money was she asking for at the time, do you recall?
>
> [Chrisman]: Originally we were discussing $100,000.
>
> [Counsel]: And what did you say to her about her request that you put the sample bank loan letter on your letterhead?
>
> [Chrisman]: I told her that we do proposal letters and have done them in the past, *that there were some areas in the letter that I was not comfortable with and that I would be willing to draft another letter for her use*, and that was the letter of August 10.
>
> [Counsel]: Did you ask her at this time to provide you with some financial information about herself?
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> * * *
>
> [Chrisman]: No, not that I can recall at that meeting.
>
> [Counsel]: Well, as of the August 9 or 10 meeting, whichever date it occurred, what did you know about Ms. Boedker's finances?
>
> [Chrisman]: Nothing at that time.
>
> [Counsel]: For example, did you know what her income was?
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> [Chrisman]: No, I did not.
>
> [Counsel]: Did you know what her assets were?
>
> [Chrisman]: No, I did not.

* * *

[Counsel]: Did you know what her liabilities were?

[Chrisman]: No, I did not.

[Counsel]: Did you know what her work history was, and by that I mean, how long she worked, whether she was working part-time or full time or who she worked for?

[Chrisman]: No, the only indication she gave me was that she had done some consulting work for the radio industry.

[Counsel]: Did she tell you who her clients were?

[Chrisman]: No, she did not.

[Counsel]: Did she give you any idea what the earnings of this consulting arrangement were?

[Chrisman]: No, she did not.

[Counsel]: Now, at this meeting on August 9 or 10, did she explain to you how $100,000 would be sufficient for her purposes?

[Chrisman]: She basically stated that she needed the letter in the amount of $100,000 to be submitted with the application. There's no discussion that I can recall as far as where that number came from.

11. Boedker confirmed that Chrisman did not request financial documentation at this meeting, but stated that Chrisman "told me I would have to provide . . . those documents if I . . . wanted to proceed with the loan." (Tr. 142). In any event, Chrisman then issued the August 10 letter to Boedker. However, because the bank letter did not track the terms of the "sample" letter, Boedker immediately consulted with counsel concerning the qualifying language in the letter and the amount ($100,000). In response, counsel telephoned Chrisman directly, and Boedker went back to see Chrisman on August 12, 1987, this time seeking a bank letter for $250,000 with "stronger language" (Tr. 57-59, 151-152). [1] When Boedker asked for this "stronger" letter and a commitment for $250,000, Chrisman, in turn, asked her to provide a business plan, CPA proposals, projections, personal income tax returns, and financial statements (Tr. 59); [2] however, at this August 12 meeting, Boedker and Chrisman again did not discuss her income, assets or liabilities (Tr. 61), and Boedker did not supply any financial documentation to Chrisman.

12. Chrisman subsequently furnished Boedker with a new letter, dated August 12, 1987 (*see* para. 8, *supra*). Upon review of this letter, counsel advised Boedker that a phrase ("please be advised that the Commonwealth Bank and Trust Company has an interest in extending the loan request to your company") was not "perfect" (Tr. 160). However, in this regard, Chrisman specifically testified that he did not employ the language of the "sample" bank letter because there was only "some interest on our part to proceed with the loan request pending receipt of the necessary information . . . ." (Tr. 65). Further, Chrisman testified (Tr. 58-61, 66-67; emphases added):

[Zurick Counsel]: Now the letter you signed was different than the letter she asked for?

[Chrisman]: That's correct.

[Counsel]: And why was that?

[Chrisman]: *At the time we were not willing, as far as the bank, to extend a loan to her company.*

* * *

[Counsel]: [During Boedker's meeting with Chrisman subsequent to August 10] did she ask you . . . if you would consider changing the language of your August 10 letter?

[Chrisman]: There was discussion . . . that she was requesting a little stronger letter from the bank, as far as wording was concerned.

* * *

[Counsel]: Well, when she requested the stronger language, *what did you say to her* ?

[Chrisman]: *That I could not provide her with any stronger language because we were not willing at that time to approve a request for $ 250, 000.*

* * *

[Counsel]: Did you on the 12th of August 1987, when you signed [that letter} . . . did your bank have a present firm intention to loan Ms. Boedker $250,000?

[Chrisman]: No, sir.

* * *

[Counsel]: This [August 12 letter] is a commitment letter?

[Chrisman]: No, sir.

[Counsel]: What kind of letter is it?

[Chrisman]: An accommodation letter.

13. Nearly one full year subsequent to the time she affirmatively certified her application, Boedker returned to the Commonwealth Bank (in August 1988) and, through Chrisman, requested a loan in the range of $40,000-$100,000. (Tr. 68-71; 122-123). Boedker brought her husband, Jens, to this meeting (Tr. 71). Boedker told Chrisman that the purpose of the loan was, at least in part, to cover start-up costs, attorney's fees and application fees incurred in the prosecution of her FCC application (Tr. 69; 121-122). Chrisman filled out a loan application form for the Boedkers based on the information she provided (Tr. 69-70; Zurick Exh. 6). Chrisman also asked the Boedkers for personal financial statements and joint federal income tax returns (Tr. 71-72). From that information, Chrisman learned for the first time the Boedkers' income, assets and liabilities (Tr. 72; Zurick Exhs. 7 and 8; Tr. 161). Even though the loan request contemplated only Mrs. Boedker as the recipient of the proceeds, Chrisman found from the financial documents that Jens Boedker earned the majority of the family income in 1987 (Tr. 76), and, as a result, both Boedkers' would be required to jointly execute any note because Mr. Boedker earned $90,000 in 1987 and Mrs. Boedker earned only $625. (Tr. 76). Additionally, based upon Chrisman's review of the Boedker's financial information, and even though a loan in the range of $40,000 to $100,000 was requested, Chrisman determined that the Boedkers only qualified for a home-equity loan of $21,000 (Tr. 78). Chrisman testified that Mrs. Boedker herself would not have qualified for a $250,000 loan in 1988 (Tr. 80), and that had she applied, she would have qualified for very little, if anything (Tr. 79). Indeed, Boedker admitted that she had to rely on her husband's income to qualify for the $21,000 loan (Tr. 123). She knew that her salary was inadequate for such a loan and that she would not have qualified individually for even a $21,000 loan (Tr. 123). In fact, the Boedkers ultimately were required to pledge all of their property (excluding a vacant building in which the bank was not interested), to secure the $21,000 loan (Tr. 124-125). [3]

14. In February 1989, Chrisman was deposed in this proceeding, and there stated that the bank's August 12 letter to Boedker was no more than a letter of accommodation (Tr. 165). Boedker, who attended this deposition, claimed that she was "shocked" to learn this (*id.*). However, rather than returning to Chrisman to clarify the matter ("because I was under the impression I couldn't approach him because [Chrisman's attorney at deposition] . . . was ill-mannered and rude"; Tr. 166), she went back to one of the original local banks she had approached in 1987 in an attempt to secure yet another "bank letter" (Tr. 170). This bank again refused to issue such a letter to Boedker (Tr. 171), and she advised her counsel accordingly (Tr. 172). Counsel then recommended the Mercantile Safe Deposit & Trust Company in Baltimore, Maryland (*id.*), which issued Boedker a letter on February 28, 1989 (Boedker Exh. 4).

15. *Discussion* : Turning first to procedural matters, the ALJ here ideally should have formally added a basic financial qualifications issue against Boedker in addition to the specific misrepresentation issue (Issue 6). While the ALJ observed at hearing that he believed that his specified misrepresentation issue encompassed all aspects of Boedker's financial qualifications (Tr. 138-139), and thus provided the parties actual notice of the intended scope of inquiry under the issue, it is ordinarily preferable to separately and distinctly specify such basic qualifications and misrepresentation issues. *See Webster - Fuller Communications Associates*, 3 FCC Rcd 6967 (Rev. Bd. 1988). The former, of course, when it applies to financial considerations, is an objective inquiry to determine whether an applicant has "reasonable assurance" of *committed* sources of funds to construct and operate when initially certifying its application. As the Commission has recently noted in reaffirming its financial qualifications standards:

> [A] broadcast applicant . . . must have reasonable assurance of having sufficient funds to construct the proposed station and operate it without revenue for three months *before* the applicant certifies its financial qualifications. In other words, the applicant may not certify its financial qualifications and then arrange financing. *Pepper Schultz*, 103 FCC 2d 1052, 1058-59 §11 (Rev. Bd. 1986), *review denied*, 2 FCC Rcd 1476 (1987), *recon. granted in part*, 3 FCC Rcd 1200 (1988).
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> * * *
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> In order to prove reasonable assurance of financial qualifications at the time of certification, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of funds to meet these estimated expenses, the applicant must provide *substantial and reliable evidence* showing "sufficient net liquid assets on hand, *or committed sources of funds* to construct and operate for three months without revenue . . . ."

Northampton Media Associates, 4 FCC Rcd 5517, 5518-19 (1989) (emphases added). Conversely, the latter issue (*viz.*, misrepresentation of financial qualifications), inquires as to whether an applicant knew (or had reason to know) that it had no genuine commitment to obtain funds for initial construction and operation, but affirmatively certified as to its financial abilities nonetheless. The Board has often rejected applicants as financially unqualified, based on objective evidence, but has not necessarily reached the question of whether there existed a conscious intent to deceive. *See, e.g., Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945, 7948 (Rev. Bd. 1989); *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985). Here, however, while the ALJ made detailed findings under the misrepresentation issue, and did not separately adumbrate his conclusions, we hold that Boedker did, in fact, misrepresent her financial qualifications to the Commission.

16. Further, under the facts of this case, we hold that no remand is necessary to include a specific financial qualifications issue to determine that Boedker should also be disqualified with respect thereto. Nor is it necessary or appropriate to remand the proceeding for the ALJ to set forth specific conclusions with respect to the financial misrepresentation issue, pursuant to 47 C.F.R. §1.267(b). Indeed, counsel for Boedker indicated his view at oral argument that a remand is not necessary for the Board to reach its own conclusions from the extant record. *See* Tr. 337-340. We agree that the record contains sufficient consideration of Boedker's financial qualifications, and that a

remand would serve no useful purpose. Thus, any error by the ALJ in this regard, in the context of this proceeding, is harmless.

17. Boedker, who did not except to the ALJ's findings of fact under the financial issue, has conceded that the " *Commonwealth Bank had actually provided her with less than reasonable assurance and that she was not financially qualified at the time she certified her application.* " Boedker Reply at 8, (emphasis added). Notwithstanding, Boedker asserts that it was only Chrisman's deposition testimony to this effect (in February 1989), which was a surprise, that made her realize that she did not possess "reasonable assurance" of funds to construct and operate.

18. In order to assess this defense, it is useful to review the facts and the ALJ's findings under the misrepresentation issue. The record here demonstrates that (1) Boedker, prior to the time she certified and filed her application, approached two local banks in an attempt to obtain a letter indicating that she had "reasonable assurance" that a financial institution would make funds available to her for construction and operation, but was wholly unsuccessful; (2) she obtained from her communications counsel a sample "bank letter" (and related memorandum), which purportedly comported with FCC financial "reasonable assurance" standards; (3) she contacted the Commonwealth Bank, showed an officer of the bank the "sample" letter and memorandum, and the bank issued Boedker a letter dated August 10, 1987 which did not track counsel's sample letter; (4) Boedker was so concerned with the language of the August 10 letter she immediately contacted counsel, who thereupon called the bank officer; (5) Boedker returned to the bank within two days to request a new letter with "stronger" language (and an increased amount); (6) the bank, without reviewing any of her financial data whatsoever, issued another letter dated August 12, 1987, which clearly contained equivocal language and a statement that the letter was "not a commitment"; (7) upon further review of the August 12 letter, Boedker was advised by counsel that the letter was not "perfect"; (8) Boedker nevertheless affirmatively certified her financial qualifications on August 24, 1987 and filed her application on August 27, 1987.

19. Based upon the uncontroverted record evidence, we hold that Boedker clearly was not financially qualified to construct and operate her proposed facility at the time she filed her application. Indeed, Boedker concedes as much, and the Commonwealth bank official, Chrisman, confirmed that no commitment had been issued from that institution. Further, the record evidence compels the conclusion that Boedker knew at the time she certified that she did not possess any "reasonable assurance" of such funds. Thus, Issue 6 must be resolved adversely to Boedker. As the ALJ presciently observed in his *Memorandum Opinion and Order*, FCC 89M-1054, *supra* at para. 8:

> Were it claimed and made evident that Ms. Boedker is wholly unsophisticated in the ways of common business or banking practices, a condition not evident, a hint of plausibility to her mistaken belief in the effect and meaning of the bank "accommodation" letter might be entertained. Rather, armed with the guidance of experienced counsel, throughout, indeed, with a suggested appropriate bank commitment sample, and failing to obtain the full measure of unqualified commitment, she, nevertheless, certified to her financial viability; thus, consciously and with apparent purpose misrepresented that fact to this agency.

20. In weighing the entire record evidence here, we must conclude that the ALJ's initial observations were proven in the proceeding below, and can only result in the determination that Boedker did, in fact, misrepresent her financial qualifications to the Commission at the time she executed and filed her application. Despite her claim that Chrisman's deposition testimony that she had merely an "accommodation" letter came as a complete "shock," the record shows that she knew that the bank required her to supply financial information, a business plan, and similar documents, if she want to proceed with the loan (Tr. 142). She also knew that the August 12, 1987 letter she obtained, after much negotiation with bank, expressly stated that "[t]his letter, of course, is not a commitment but rather an expression of interest . . ., " yet she affirmatively certified on her FCC application that she clearly and expressly had obtained reasonable assurance of " *committed sources* " of funds (Boedker Application (FCC Form 301), Sec. III). In light of all of the attendant circumstances, we find that Boedker knew full well that she had no "commitment" of a $250,000 loan from Commonwealth Bank, yet certified her application in the affirmative notwithstanding. This was a clear misrepresentation.

21. In its *Policy Regarding Character Qualifications in Broadcast Licensing* (*Character Policy Statement)*, 102 FCC 2d 1179 (1986), the Commission has made clear that:

> We believe it appropriate to give misrepresentation specific consideration in the context of this *Policy Statement*. The act of willful misrepresentation not only violates the Commission's Rules; it also raises immediate concerns over the licensee's ability to be truthful in any future dealings with the Commission.
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> * * *
>
> As we have stated, the trait of 'truthfulness' is one of the two key elements of character necessary to operate a broadcast station in the public interest. The Commission is authorized to treat even the most insignificant misrepresentation as disqualifying.

102 FCC 2d 1179, 1209-11. *See Mid - Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986), *aff'd* , 5 FCC Rcd 940 (1990). Moreover, "the fundamental importance of truthfulness and complete candor on the part of applicants, as well as licensees, in their dealings with the Commission is well established." *Lebanon Valley Radio, Inc.*, 35 FCC 2d 243, 258 (Rev. Bd. 1972), *review denied*, 39 FCC 2d 1099 (1973), *rev' d on other grounds sub nom. Lebanon Valley Radio, Inc. v. FCC*, 503 F.2d 196 (D.C. Cir. 1974). *See also FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946). Here, the record evidence establishes that Boedker was not financially qualified at the time she executed and filed her application. However, even knowing this (and perhaps because of the time constraints involved to meet the filing deadline of August 27, 1987),

Boedker nevertheless filed her application, claiming that she had "reasonable assurance" of funds available to her for her proposed construction and operation.

22. Further, even if we were to accept Boedker's claim that she had a good faith belief that she had a firm $250,000 "commitment" from Commonwealth Bank at the time she certified her application, we find that her failure to report that when she and her husband sought a much smaller loan from Commonwealth Bank (to be partially used for purposes of this application), the bank would loan no more than $21,000, even using their real property as collateral. Consequently, and even assuming *arguendo* her prior good faith belief in a $250,000 "commitment," Boedker must have been aware that Commonwealth Bank would not lend her $250,000 at that point. Her claim that she "never connected those two incidents" (*i.e.*, her two Commonwealth loan requests, *see* n.3, *supra),* is inherently incredible. Under Section 1.65 of the Commission's Rules, 47 C.F.R. § 1.65, Boedker had a clear duty to report that she (and her husband) could qualify for no more than a $21,000 loan from Commonwealth Bank; to declare her previous claim of a $250,000 "commitment" inoperative; and to amend her application to indicate she did not have "reasonable assurance" of funds to construct and operate, or, alternatively, report new financing, if she could meet the test set out in, *e.g., Bison City Television 49 Limited Partnership*, 91 FCC 2d 26 (Rev. Bd. 1982). Instead, Boedker reported nothing.

23. The court has held that 47 C.F.R. §1.65 requires absolute candor, *RKO General, Inc. v. FCC*, 670 F.2d 215, 235 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 927 (1982), and that the Commission may find a disqualifying lack of candor where it is "of such blatant and unacceptable dimension that it cannot be denied," even if no specific lack of candor issue is specified in advance. As the *RKO* court indicated, and as the Board has repeated, in *Silver Star Communications - Albany*, 3 FCC Rcd 6342, 6350 (Rev. Bd. 1988), such occasions "will be a rare case, indeed." But, based on the ALJ's findings surrounding the $21,000 loan here, we further believe Boedker's failure to report on her Commonwealth Bank loan limitation reflects just such a lack of candor of "blatant and unacceptable dimension." Not only does Boedker's egregious lack of candor in this regard stand on its own as a grave delict, the reporting failure is strong corroboration of her intent to deceive as to her basic $250,000 "commitment.

ISSUES 1-5 AND REQUESTED REAL-PARTY-IN-INTEREST ISSUE

24. We need not review the ALJ's resolution of Issues 1-2 because neither applicant has filed any exceptions thereto. *See* 47 C.F.R. §1.277(a). Further, having found that (1) Boedker was not financially qualified at the time she filed her application and (2) she must be disqualified with respect to Issue 6, we need not review the exceptions to the ALJ's adverse resolution of Issues 3-5, or his evaluation of the comparative attributes of the parties. *See Tri - State Broadcasting Co., Inc.*, 5 FCC Rcd 1156, 1173 (Rev. Bd. 1990); *Belo Broadcasting Corp.*, 68 FCC 2d 1479, 1488 (1978); *Louis Adelman*, 29 FCC 1223 (1960), *aff'd sub nom. Guinan v. FCC*, 297 F. 2d 782 (D.C. Cir. 1962); *Deep South Broadcasting Co. v. FCC*, 278 F. 2d 264, 268 (D.C. Cir. 1960).

25. With respect to the requested "real-party-in-interest" issue against Zurick, Boedker initially filed a Motion to Enlarge Issues on January 18, 1989, seeking such an issue. There, as here, Boedker claimed that deposition testimony purportedly revealed that William Zurick's son, James, was involved in Zurick's application. Boedker noted that William Zurick stated that he and his son had traveled to potential transmitter site locations, and that his son had participated in completing various components of the application, including the programming statement. In addition, James was purportedly involved in the retention of counsel and application work; had set up the public file; accomplished the local notice of publication of the hearing issues after designation for hearing; and received copies of all pleadings filed in the proceeding.

26. In response, Zurick pointed out that he alone first learned of the availability of the channel; retained engineering counsel; obtained access to his first transmitter site; personally obtained his bank letter; met with counsel and retained him for the application; and, significantly, paid all of the costs of prosecuting his application. With regard to the role of James, William Zurick pointed out that his son was a lawyer and merely represented him in his business matters. Zurick Reply Exceptions at pp. 14-15.

27. In declining to add this issue, the ALJ, in his *Memorandum Opinion and Order*, FCC 89M-125, released March 7, 1989, declared:

> the cardinal foundation stone warranting issue enlargement is "specific allegations of fact sufficient to support the action requested," Rule 1.229(d); neither speculation, surmise or other will suffice. Here, little more than that, speculation, appears concerning the true role of Zurick's son; clearly, no sense of ownership or potential for control appears.

Additionally, Zurick more specifically states in his Reply Exceptions (at 15) that:

> Boedker persists in seeking a second hearing on this matter even though she had the opportunity to test the son's involvement in the application at hearing and produced no new facts. Zurick testified at hearing and Boedker was given the opportunity to press her case about the role Zurick's son played in the application, over the objections of Zurick's counsel. While the Presiding Officer questioned the relevance of some of Boedker's inquiries, he stated " . . . No, I am not going to cut you off . . . " and Boedker proceeded with her real-party-in-interest questions to no avail (Tr. 312).
>
> Boedker's examination elicited the following facts: that Zurick's son accompanied him on a couple of Sundays when Zurick was looking for a site (Tr. 308); that the son filed the public notices in the local newspaper regarding the filing and designation of the application for hearing (Tr. 313-214); that Zurick may have discussed with his son some portions of his application when the application was being prepared for filing because they share an office (Tr. 315-316); and that the son initially contacted the second site owner and that Zurick later spoke with the site owner and received a site letter from him (Tr. 316).

28. In her Exceptions, Boedker relies upon *Magdalene Gunden Partnership*, 2 FCC Rcd 5513 (Rev. Bd. 1987), in support of her position that Jens Boedker would not control her proposed facility (in violation of 47 U.S.C. §319(b). Here, we find that that authority undercuts Boedker's requested real-party-in-interest issue against Zurick. More specifically, in *Magdalene Gunden* the Board recalled an earlier proceeding in which we opined:

> Parties seeking [a real-party-in-interest] issue where family members are involved . . . bear a heavy burden since the Commission recognizes that even independent family relationships may have attributes such as financial ties which in a non-family relationship would be persuasive indicia of real party status.

Magdalene Gunden, *supra*, at 5516, citing *High Sierra Broadcasting, Inc.*,, 96 FCC 2d 423 (Rev. Bd. 1983). Thus, the Board ultimately held that a real-party-in-interest issue was not there required because the petitioners:

> did not establish anything beyond a familial relationship and financial assistance to demonstrate that [the individual in question] would have an ownership interest or be in a position to actually or potentially control the operation of the station. *See also Corvallis Broadcasting Corp.*, 38 FCC 2d 30 (Rev. Bd. 1972).

Id. (footnote omitted). *See generally also Llerandi v. U. S.*, 863 F.2d 79 (D.C. Cir. 1988). In light of the foregoing, we hold that the ALJ did not err in refusing to add the requested real-party-in-interest issue against Zurick.

CONCLUSIONS

29. Having determined that Boedker was not financially qualified at the time she filed her application and intentionally misrepresented her financial status to the Commission when she so filed, and must thus be disqualified, we conclude that Zurick is the only fully qualified applicant remaining in this proceeding. Thus, his application will be granted.

30. ACCORDINGLY, IT IS ORDERED, That the application of Rebecca L. Boedker (File No. BPH-870827ML), IS DENIED, and the application of William Phillip Zurick (File No. BPH-870827MN), for a new FM broadcast facility at Northumberland, Pennsylvania, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Boedker claimed at hearing that she did not tell Chrisman on this visit that she had a problem with the language of the August 10, 1987 bank letter (Tr. 149). However, when confronted with her deposition testimony to the contrary, she admitted that she had, in fact, told Chrisman that she had a problem with the word "entertain" and wanted that word deleted from the subsequent letter (Tr. 151-152).

[2] Boedker claimed that Chrisman did not ask for any financial documentation from her at this meeting, Tr. 152, but admitted that Chrisman "had given me the name of an accountant" who she "called immediately." Tr. 154. However, upon learning that the accountant was going on vacation, and the preparation of *pro forma* statement would cost approximately $4,000, Boedker called Chrisman and Chrisman purportedly told her he would not put her "to the time and expense. *Id.*

[3] Boedker denied that she knew in 1988, after only qualifying for a $21,000 loan with her husband's assistance, that she, individually, would not qualify for a $250,000 loan from the same bank (Tr. 162). She claimed she "never connected those two incidents . . . ." *Id.*

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-577

In re Applications:

NATIONAL COMMUNICATIONS INDUSTRIES	File No. BPH-870831MF
RAKEL COMMUNICATIONS, INC.	File No. BPH-870831MG
LIBERTY PRODUCTIONS, A LIMITED PARTNERSHIP	File No. BPH-870831MI
WILLSYR COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870831MJ
BILTMORE FOREST BROADCASTING FM, INC.	File No. BPH-870831MK
SKYLAND BROADCASTING COMPANY	File No. BPH-870831ML
UNITED BROADCASTING ENTERPRISES, INC.	File No. BPH-870831MN
ORION COMMUNICATIONS LIMITED	File No. BPH-870901ME
HARBINGER BROADCASTING COMPANY	File No. BPH-870901MF

For a Construction Permit For a New FM Station in Biltmore Forest, North Carolina

APPEARANCES

J. Richard Carr and *Audrey L. Allison* on behalf of National Communications Industries; *Howard W. Simcox, Jr.* and *Harry F. Cole* on behalf of raKel Communications, Inc. *Timothy K. Brady* and *Gary S. Smithwick* on behalf of Liberty Productions, A Limited Partnership; *Stephen T. Yelverton* on behalf of Willsyr Communications Limited Partnership; *Donald J. Evans* and *Pamela C. Cooper* on behalf of Biltmore Forest Broadcasting FM, Inc.; *Robert A. DePont, Anna E. Goodwin,* and *Mania K. Baghdadi* on behalf of Skyland Broadcasting Company; *W. T. Denman, III* and *Glenn W. Wilcox, Sr., pro se* on behalf of United Broadcasting Enterprises, Inc.; *Eugene F. Mullin, Nathaniel F. Emmons,* and *Mary C. Lawless* on behalf of Orion Communications Limited; *William K. Keane* and *Rebecca L. Dorch* on behalf of Harbinger Broadcasting Company; and *James W. Shook* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: April 26, 1990; Released: May 4, 1990

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INTRODUCTION

1. Thirteen applicants began the quest to operate a new FM station in Biltmore Forest, North Carolina on Channel 243A. Nine remain: (1) National Communications Industries (NCI); (2) raKel Communications, Inc. (raKel); (3) Liberty Productions, a Limited Partnership (Liberty); (4) Willsyr Communications Limited Partnership (Willsyr); (5) Biltmore Forest Broadcasting FM, Inc. (BFBFM); (6) Skyland Broadcasting Company (Skyland); (7) United Broadcasting Enterprises, Inc. (United); (8) Orion Communications Limited (Orion); and (9) Harbinger Broadcasting Company (Harbinger).

2. After the interlocutory cycle had run its course, and the faltering applications were dismissed, five factual issues and the ultimate issue remained for resolution. Of the five factual issues four were basic qualifying issues, the fifth was the standard comparative issue. Here are the issues we must resolve:[1]

BFBFM-1:

To Determine whether BFBFM has reasonable assurance that the transmitter site sprecified will be available to it;

raKel-1:

To determine whether raKel misrepresented facts in BPH-860507PE for Upper Arlington, Ohio, when they represented that the site originally specified in their application was available, and if so, what effect that has on raKel's basic qualifications to be a Commission licensee;

Liberty-1:

To determine whether Liberty has reasonable assurance that its proposed transmitter site is available, and if not, whether Liberty is basically qualified to be a Commission licensee;

Liberty-2:

To determine whether Liberty has made misrepresentations to the Commission about the proposed transmitter site's availability, and, if so, what impact that has on Liberty's basic qualifications to be a Commission licensee;

Standard Comparative:

To determine which of the proposals would, on a comparative basis, best serve the public interest; and

The Ultimate Issue:

To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted if any.

3. An additional matter must be considered under the standard comparative issue. The Chief, Audio Services Division has called for comparative coverage evidence. *See* 54 F.R. 3847 published January 26, 1989 at para. 11.

4. We held the prehearing conference on May 3, 1989, and the evidentiary admission session on June 13, 1989. Hearing sessions was on July 5, 6, 7, 10, 11, 12, 13 and 19, 1989. We closed the record on July 19, 1989. All nine applicants filed Proposed Findings of Fact and Conclusions of Law on October 23, 1989,[2] and seven filed replies on November 2, 1989. BFBFM elected not to, and United failed to. [3]

PRELIMINARY RULING

5. United Broadcasting Enterprises, Inc.'s (United's) application (BPH-870831MN) will be dismissed for failure to properly prosecute. From the outset United has been represented *pro se* by two of its principals, W. T. Denman and Glenn Wilcox. Even though Denman and Wilcox were put on notice that they were expected to be fully cognizant of Part I of the Commission's Rules on Practice and Procedure, they made absolutely no effort to so become cognizant. *See* 54 F.R. 3847. Consequently, they ended up ignoring the procedures set out in the Prehearing Order (FCC 89M-361). Instead of filing plead-

ings under the rules, Denman and Wilcox tried to deal directly with the Presiding Officer by telephone and letter. *See e.g.* the March 23, 1989 answer to Wilcox from the Presiding Officer, and FCC 89M-1247 released April 21, 1989.

6. They ignored the prehearing admonition to join in a joint engineering coverage exhibit. *See* FCC 89M-361 *supra.* at para. 5. Consequently, it was held that their proposal was not entitled to a coverage comparison with other applicants.[4] (Tr. 9-10, 15-16, 62-63).

7. Denman's and Wilcox's crude attempts to prepare, identify, and offer viable comparative exhibits was a disaster (Tr. 158-167). They had no idea what kind of information the Commission considers under the standard comparative issue, and they made no effort to find out. So the material they did collect was totally irrelevant. Also, their stab at preparing and filing Proposed Finding of Fact and Conclusions of Law was equally disastrous. The material they submitted was vague, for the most part unintelligible and devoid of any record citations. As a tool for writing an Initial Decision, they are worthless.

8. Finally, it developed during the course of the evidentiary admission session that United (Denman and Wilcox) is licensee of Station WISE(AM), Asheville, North Carolina. Asheville is within the 1 mV/m contour of United's Biltmore Forest proposal, and they have made no commitment to divest if their FM proposal were granted. So even if their application were not being dismissed for failure to prosecute it would still be denied. United would receive a decisionally significant demerit under the diversification of mass media criterion, and they seek no quantitative or qualitative integration credit. So United's application will be dismissed, and it will be given no further consideration.

BASIC QUALIFYING ISSUES

9. *BFBFM - 1: Transmitter Site Availability.* BFBFM filed their application on August 31, 1987. There they certified that they had a transmitter site available, the Wabish site. As a part of their certification, they included a letter from the then land-owner, Rebecca Wabish.

10. On October 9, 1987, less than a month and a half later, Rebecca Wabish sold the land in question to a Nancy Bryan. Apparently unaware that Ms. Wabish had sold their transmitter site out from under them, BFBFM filed a transmitter site amendment on November 16, 1987. There they purported to correct the site coordinates for the site they didn't have. In so doing they nevertheless represented to the Commission that "[t]he proposed transmitter site requested by this application is available for said use . . . " Of course it wasn't, and BFBFM had taken no steps to be certain that their amended representation was accurate. However (and it's passing strange) BFBFM never recertified that its proposed transmitter site was available.[5]

11. In the summer of 1988, a full six months before this case was designated for hearing, BFBFM learned that their transmitter site land had been sold, and that their proposed site was no longer available. Yet they did nothing.

12. On January 19, 1989, the Chief, Audio Services Division designated this case for hearing. *See* 54 F.R. 3847 published January 26, 1989. Since BFBFM's November 16, 1987 application did not contain a site certification, the Chief placed a site availability issue against them. *See* 54 F.R. 3847 *supra.* at Finding 4, and Issue 2. This meant that under 47 CFR 73.3522(b)(2), BFBFM had until February 27, 1989, to secure a new transmitter site and amend as a matter of right. Still they did nothing.[6]

13. Finally, on March 20, 1989, BFBFM moved to change transmitter sites. Three of their competitors (Skyland, Willsyr and Harbinger) opposed that request. The Presiding Officer denied the petition on April 5, 1989 (FCC 89M-1084). He held that BFBFM's original site had been lost even before the November 16, 1987 amendment; that BFBFM lacked diligence; and that, if BFBFM's March 20, 1989 amendment were granted at this late stage it would necessarily require the addition of issues.[7] Subsequently, BFBFM was denied leave to appeal that ruling. *See* FCC 89M-1204 released April 18, 1989. Still later, BFBFM unsuccessfully moved for Summary Decision on their site availability issue. *See* FCC 89M-1640 released June 12, 1989.

14. At the June 13, 1989 evidentiary admission session, BFBFM identified and offered a site availability exhibit (Tr. 115, 118). That exhibit was denied. It lacked relevance, contained untrustworthy hearsay, and went beyond the scope of the written direct case. *See* Tr. 118-138.

15. *BFBFM - 1: Intermediate Facts.* Based on the foregoing findings (Findings 9-14 *supra.*) certain intermediate facts are warranted. BFBFM does not now and since October 9, 1987 has not had an available transmitter site. Their November 16, 1987 representation that "[t]he proposed transmitter site requested by this application is available for said use" proved to be abjectly false. By the summer of 1988, BFBFM knew that their November 16, 1987 representation was false. Yet they did nothing about it. Nor did they make any significant moves to obtain another site. Even after the Chief, Audio Services Division added a site availability issue against them, BFBFM failed to move in a timely fashion. Consequently, they couldn't demonstrate that they had a reasonable assurance that they had a viable transmitter site available. Since BFBFM's November 16, 1987 transmitter site is not available, BFBFM has no transmitter site, and isn't basically qualified to be a Commission licensee.

raKel - 1: A Past Misrepresentation Issue

16. Under Issues raKel-1, we must determine whether raKel misrepresented, when in May 1986, they filed an application (BPH-860507PE) for Upper Arlington, Ohio. More specifically, we're concerned with raKel's representation that it was reasonably assured that its original Upper Arlington transmitter site was available at the time they filed.[8]

17. raKel filed its Upper Arlington application on April 30, 1986. Michael Klepper, raKel's Treasurer, a Director, and a 13.24% stockholder, was assigned the duty of obtaining a transmitter site for that application (Tr. 389-391).

18. Before he undertook the site search, he sought the advice of both legal counsel and his consulting engineer. They told him that he needed a "reasonable assurance" that a site would be available, and that in order to obtain this, he needed to meet with the property owner or his agent; he needed to explain why raKel wanted the property; and he needed to discuss terms for acquiring the property, and to be able to meet those terms. Klepper's

consulting engineer gave him area maps which depicted the area in which raKel's transmitter could be located (Tr. 393-396 raKel Exs. 6-7).

19. Next Mr. Klepper got the names of some real estate agencies in the Upper Arlington (Columbus), Ohio area. He settled on a business named Ohio Equities. He called Ohio Equities and spoke with a Richard Quimby, an Ohio Equities agent. He described to Quimby what he needed, and arranged for a face-to-face meeting (Tr. 397-400, 402, 433).

20. On April 29, 1986,[9] Klepper went to the Ohio Equities' office in Columbus. He met briefly with Mr. Quimby who turned him over to another agent, Brent Starts. He explained to Starts why he was there and what he wanted to accomplish. He provided Starts with the maps his engineering consultant had given him. Starts then mentioned various possible sites. Klepper rejected the first site since it wasn't in the useable area depicted by his engineer (Tr. 402-403, 405-406, 480, 482-483, 565).

21. Starts then pointed to a piece of property owned by an entity called Rainbow Development Corporation. But the Rainbow property was very close to the boundaries drawn on the map delineating where raKel could place its tower. So Klepper called his engineer and asked him whether the boundary lines were flexible. He was told there was no flexibility (Tr. 406-407, 429- 430, raKel Ex. 12).

22. Starts told Quimby that the maps and other information on the Rainbow property were in Quimby's office. They went there and got two maps from Quimby (one of which was a zoning map) as well as the listing for the Rainbow property (Tr. 413-414, raKel Exs. 8-10). But the listing showed that the only property that Rainbow had authorized Ohio Equities to sell was the *northeast* corner which was unsuitable for raKel's purposes (Tr. 417, 421-422, raKel Exs. 8-9). So Klepper focused his interest on the *southwest* portion of the Rainbow property because it was within raKel's useable area.

23. Based on past experience, Klepper told Starts he would need 2 1/2 areas, but he telephoned raKel's consulting engineer and confirmed that 2 1/2 acres were sufficient. Although the *southwest* portion of the Rainbow property wasn't included in the listing, Klepper says that he believed that it too was for sale, and that Ohio Equities was the agency for the property. The reason he believes that, says Klepper, is that he and Starts "discussed the piece of property . . . extensively and price and everything else and he [Starts] assured me [Klepper] the deal could be done." (Tr. 418-419, 424-425, 456-457, 495). Starts doesn't recall making that statement, but does recall that the overall tone of the meeting was "positive." (Tr. 492, 535, 541).

24. However, neither Ohio Equities, nor Quimby, nor Starts had any listing for the southwest portion of the Rainbow property; Klepper never asked if Ohio Equities, Quimby or Starts was the listing agent; and Starts admits that if he had secured a buyer for the unlisted southwest corner he would have had to contact Rainbow before he could make any commitment to the prospective purchase (Tr. 457, 555-556, and 2825-2826). Needless to say no one ever contacted the owner of the property, Rainbow Equities, and no offer to sell was ever prepared or furnished Klepper.

25. As he was leaving Klepper says he mentioned to both Starts and Quimby that he intended to use their names on raKel site certification. He showed a blank site certification, and claims they said it was no problem although they didn't read the form. However, Quimby says he doesn't know how his names got on the site certification (Tr. 434-436, 459, 536-537, and 2820).

26. Klepper says that when he left the Ohio Equities' office, he had satisfied the purpose of his visit. He believed he had met with an agent for a piece of property[10] which could be used for raKel's transmitter; he had discussed terms for acquiring the property; he had explained what raKel intended to do with the property; and he was told several times that the deal could be done (Tr. 449, 538).

27. On October 12, 1987, Brent Starts executed a declaration under perjury in the Upper Arlington case. There he said:

> "I do not recall having spoken with anyone from raKel . . . or anyone else who identified themselves as interested in using that location [i.e., the Rainbow property] for the construction of a broadcast tower. . . .
>
> I did *not* provide *anyone* with permission to designate that location for the construction of a tower I would not have had the authority to give such permission . . . "

(raKel Ex. 2; Tr. 543, 547).

28. Less than two months later, on December 2, 1987, Starts again declared under penalty of perjury that (raKel Ex. 3, Tr. 548).

> "It is my understanding that Michael R. Klepper of Rakel (sic) Communications, Inc. has stated that he met with me and that I provided him with assurances concerning the availability and price of purchasing a piece of property located . . . *To the best of my knowledge*, that is not accurate . . . to the best of my knowledge I never provided anyone with assurances regarding the availability, cost, terms, etc. for a piece of property located [the unlisted, *southwest* corner of the Rainbow property]. I was not the agent in charge of that particular piece of property."

29. At the hearing Starts testified that the attorney who had asked for the October 12th (see Finding 27 *supra.*) declaration had not connected raKel with Klepper and that he (Starts) did in fact recall meeting Klepper (Tr. 544). He also said that he didn't connect the property reference in the Declaration to the Rainbow property, but he did recall that he and Klepper had also discussed the southwest corner of the Rainbow property (Tr. 495-496, 500, 549).

30. Starts was aware that at the time he signed these two declarations (Findings 27-28 *supra.*) that they would be filed with the FCC in a formal proceeding. And he also realized that his December 2 declaration would be used to discredit Klepper. But he felt comfortable signing the declarations (Tr. 543, 547, 569-570).

31. In early 1988, after he had signed the second declaration, Starts met with Klepper and raKel's counsel (Harry Coles) in Los Angeles (Tr. 442-443, 446, 552-553). After his meeting, Starts executed still a third declaration (raKel Ex. 4). Counsel sent a draft declaration to Starts. That draft was revised at least once before Starts would sign it. Unlike the comfortable feeling he had with the first draft of the first two declarations, on this one Starts "went back and forth" with raKel's counsel about the wording in this declaration until he became comfortable with it (Tr. 562-563).

32. Consequently, the third declaration (January 27, 1988) is peppered with references to what *Michael Klepper* recalls (not Brent Starts).[11] It is also loaded with hedge words like "possibly," "it is possible" "most likely." Moreover, this third declaration is filled with what Mr. Starts can't "specifically recall," and words of surmise like "I understand that . . . " and "[o]n the basis of my experience" (raKel Ex. 4).

33. *raKel - 1: Intermediate Findings*. There are *some* facts which would permit the finding that Michael Klepper (raKel), under time constraints, falsely certified to the availability of raKel's transmitter site. But those facts are outweighed by the candid testimony of Michael Klepper,[12] as corroborated by Brent Starts in almost all material respects. So any doubts that are occasioned by certain record facts will be resolved in raKel's favor.

34. The weight of the evidence demonstrates that raKel had the required reasonable assurance that its transmitter site was available when they filed their Upper Arlington applications. On April 29, 1986, Michael Klepper made a good faith (albeit last-minute) effort to ascertain from knowledgeable real estate agents whether a site was available within the useable area delineated by his engineer. He told the agent that he wanted the property for a radio tower, and how much land he needed; he reviewed the pertinent maps and real estate listing with the agent;[13] he discussed the availability of the site in question, and its general price terms; and the agent informed him that his firm represented the land owner and that the property was available. In fact the agent himself believed there was a sale in the works when Mr. Klepper left the real estate office.

35. Before Mr. Klepper left, the real estate agent expressly authorized him to list them as the agent on the FCC's site availability certification form. Plainly, both parties to the 1 3/4 hour discussion believed the site was available. So raKel did not misrepresent the facts in BPH-860507PE when they certified that their Upper Arlington transmitter site was available. Since raKel remains basically qualified to be a Commission licensee, it is entitled to comparative consideration.

Liberty - 1: Transmitter Site Availability

36. Liberty proposes a site that is located two miles east of Biltmore Forest on Busbee mountain. The geographic coordinates of the proposed site are 35^0 -31'-39" North Latitude, 82^0 -29'-45" West Longitude. Ms. Vicki M. Utter owns that plot of land (Liberty Ex. 6, pp. 3, 5).

37. On February 22, 1989 Ms. Utter swore: "I am *certain* that I did not give any assurance to Ms. Klemmer [Liberty's General Partner], or to any representative of Liberty, that my property would be available to it." A little later, on March 13, 1989, Ms. Utter swore, in addition, that "[a]t this time I cannot honestly say I would ever be willing to lease any property to anyone else for any purpose . . . " (Liberty Ex. 6, pp. 1-2; Liberty Ex. 7; and FCC 89M-1025 released March 30, 1989). When she was deposed on the subject Ms. Utter reaffirmed that she isn't willing to lease her property to Liberty' and she has specifically refused to sign a statement that she would be willing to do so (Liberty Ex. 13, pp 38, 46; Tr. 916).

38. Valerie Klemmer, Liberty's General Partner, admits that Liberty has no assurance. They can use the Utter site (Tr. 668, 684). Indeed she acknowledges that Ms. Utter has specifically indicated that her property will *not* be available for use by Liberty (Liberty Ex. 3). So the parties agree that Liberty doesn't have access to the site specified in its application.[14]

39. *Liberty - 1: Intermediate Facts*. Liberty has never had, and doesn't now have any reasonable assurance that the transmitter site specified in their application is available. Since they don't have a transmitter site they aren't basically qualified to be a Commission licensee.

Liberty - 2: False Site Certification

40. Ms. Vicki Utter leased a portion of her property to Channel 16 (WGGS-TV), Greenville, South Carolina. Channel 16 erected a tower on that property in early 1987. Later, on August 21, 1987, she executed a written lease with Brian Lee of Orion for another portion of her land. Orion has agreed to pay Ms. Utter $1,500 per year before the tower is built, and $4,000 per year after it is built (Liberty Ex. 13, pp. 3-4, 6, 15, 19, 27; Orion Ex. 4). Subsequently several other people contacted her about the possibility of leasing or buying her property. She told them that she had already leased land for two towers and wasn't willing to enter into any more leases because she didn't want towers all over her land (Liberty Ex. 13, pp. 21, 23.).

41. Valerie Klemmer claims that she contacted Ms. Utter on August 25, 1987, about using her property (Tr. 655). That was only six days before Liberty filed its application on August 31st. But Ms. Klemmer had no appointments to see any other sites if the Utter site negotiations didn't work out (Tr. 676). Liberty wanted to specify the Utter property because it was the best and most economical site (Tr. 957).

42. When Vicki Utter was first asked about her meeting with Ms. Klemmer in February 1989 (see Finding 37 *supra*.) she didn't recall of ever having met or spoken to her (Klemmer) or anyone associated with Liberty (Liberty Ex. 6; Liberty Ex. 13, pp. 33-34). Later she remembered having met Ms. Klemmer in August of 1987. But she stated that neither then nor at any other time did she promise or assure Ms. Klemmer that Ms. Klemmer could use her land, or even her name, for the purposes of Liberty's FCC application (Liberty Ex. 8; Liberty Ex. 13, pp. 37-38).

43. Ms. Utter further states that if she had given such a promise she would have expected Ms. Klemmer to make a commitment of some sort. She had entered into leases with Channel 16 and Brian Lee, and therefore believes that "if you're going to lease a piece of land, you would get back in touch with somebody" (Liberty Ex. 13, p. 45). Neither Ms. Klemmer nor anyone else from Liberty ever got back in touch with her. And because Ms. Klemmer had never made any commitment, Ms. Utter forgot she'd ever met her (Liberty Ex. 8; Tr. 2503-2504).

44. The August 1987 meeting took place at Ms. Utter's home. When Ms. Klemmer and her friend and neighbor Tim Warner[15] paid her a visit. Ms. Klemmer claims she called in advance, but Ms. Utter says they didn't call, but simply came by when she was working in her yard (Liberty Ex. 3, p. 3; Liberty Ex. 13, p. 25). They stood out in the yard and made small talk. They discussed the fact that Ms. Utter had leased property to Brian Lee. Ms. Utter doesn't remember anyone mentioning that Ms. Klemmer was going to file an FCC application or had anything to do with the new FM station. In fact, Ms. Klemmer didn't say much, and Mr. Warner did all the talking. So Ms. Utter assumed that it was because Mr. Warner's tower was up on the mountain that they were all standing there talking about towers. As far as Ms. Utter was concerned, they were just chit-chatting. The meeting lasted no more than 15 minutes (Liberty Ex. 13, pp. 25-27, 42-43; Tr. 674-675).

45. Ms. Utter further testified that she never even discussed the possibility of leasing to Ms. Klemmer. She admits that she has said in her March 13, 1989 statement that she had discussed the possibility of leasing to Ms. Klemmer. But she says she did because Mr. Warner came by her house in March 1989[16] to refresh her recollection about the August, 1987 meeting and he "kept insisting... that we talked about that "(Liberty Ex. 7, Liberty Ex. 13, 40). To this day Ms. Utter doesn't remember discussing that, but she included it in her statement because Mr. Warner "was adamant about it" (Liberty Ex. 13, pp. 40-41).

46. Ms. Utter is sure that at the August, 1987 meeting she told Ms. Utter and Mr. Warner that she already leased part of her property to Brian Lee. She says they even discussed the amount of the lease, and she pointed out to them the approximate location where Mr. Lee wanted to place his tower. She recalls Mr. Warner saying that he already knew about the Lee lease (Liberty Ex. 13, pp. 27, 41).

47. This record also shows that Ms. Utter couldn't have given Liberty any reasonable assurance for the site Liberty had specified in its application - even if she had wanted to (see Finding 36 *supra*.). Brian Lee has leased a 1,000 square foot section of property north of the drive way and dogpen "the exact location to be selected by lessee." Liberty has specified a site only one second of latitude south of Orion's site (Orion Ex. 4; Tr. 662-664, 978).

48. Because the Lee lease is for a variable piece of property, a large portion, if not all of the site specified in Liberty's application is probably already leased to Brian Lee (Tr. 947, 948). Liberty has no sublease agreement with Brian Lee, and has never sought any assurance from Orion that the site would be available to Liberty. Instead, Ms. Klemmer simply certified that Liberty had reasonable assurance that the site they had specified was available.

49. *Liberty - 2: Intermediate Findings*. When Valerie Klemmer certified to the Commission that Liberty had a transmitter site, she had absolutely no basis for doing so. Moreover, she knew she had no basis for so certifying. Her feeble, half-hearted, unsuccessful effort to obtain some of Ms. Vicki Utter's land on Busbee Mountain borders on the ridiculous. "Reasonable assurance that a transmitter site is available requires more than a vague 'willingness to deal' on the part of the owner of the site."[17] Here we didn't even have a vague willingness to deal.

50. What appears to have happened is that when Valerie Klemmer found out that it was going to cost money to lease Vicki Utter's land, she decided not to follow through on that idea. However, a few days later, when it came time to certify to Liberty's transmitter, she certified to the only land she knew anything about, and hoped to bluff it out. Fortunately (from the public interest standpoint) she got caught.

51. So even *assuming* Liberty was basically qualified under Liberty-1 (but see Findings 36-39 *supra*.), they would still be disqualified under Liberty-2. Because of Valerie Klemmer's misrepresentations about their transmitter site's availability, Liberty is not basically qualified to be a Commission licensee. They lack the requisite character.

THE STANDARD COMPARATIVE ISSUE
DESCRIPTION OF THE APPLICANTS

52. *National Communications Industries*. NCI, a Nevada Corporation, has a 2,500 shares of authorized capital stock. It has two principals: Anita Hunter is President and Director and owns 97% of the stock; William Hunter is Secretary and owns the other 3% of the stock.

53. *raKel Communications, Inc*. raKel, an Ohio corporation, was organized in 1979. The following chart depicts raKel's officers and directors (raKel Ex. 1, p. 1):

CHART

Name	Positions Held
Robert A. Klepper	Chairman of the Board; Chief Executive Officer; Director
James C. Pride	President
Kris A. Klepper	Vice-President; Director
Michael R. Klepper	Treasurer; Director
Elsie L. Klepper	Secretary; Director
Charles D. Hering, Jr.	Assistant Secretary; Director

54. All of raKel's stock is owned by Superior Distributing Co., Inc. Superior, an Ohio corporation, was organized in 1949. It's primary business is to operate a regional beer distribution franchise. That business is regulated by the State of Ohio. The officers, directors, and voting stockholders of Superior are set out in the following chart (raKel Ex. 1, p. 2):

Name	Positions Held	Stock Ownership
Robert A. Klepper	Chairman of the Board, Director and Chief Executive Officer	70.47%
Kris A. Klepper	President, Director	13.24%
Michael R. Klepper	Treasurer, Director	13.24%
Tanya Klepper	-------	00.57%
Anne M. [Noone] Klepper	-------	02.48%
Elsie L. Klepper	Secretary, Director	-----
Charles D. Hering	Assistant Secretary, Director	-----
Robert P. Sacksleder	Director	-----
Kent A. Broadback	Director	-----
William C. Cassell	Director	-----
Andrew H. Kalnow	Director	-----
Donald L. Mennel	Director	-----

55. The Klepper family members also own about 96.5% of the outstanding *non-voting* stock of Superior. The remaining 3.5% of the non-voting stock given to Heidelberg College and Tiffin Charitable Foundation as charitable contributions (raKel Ex. 1, p. 2).

56. *Liberty Productions, A Limited Partnership*. Liberty is ostensibly a North Carolina limited partnership. Liberty's limited partnership agreement was executed on August 27, 1987. The partnership has two principals. The proposed general partner is Valerie Klemmer who holds 35% of the partnership's equity; the proposed limited partner is David Murray who holds the other 65%.

57. *Willsyr Communications Limited Partnership*. Willsyr is ostensibly a North Carolina limited partnership. Sharan A. Harrison, Willsyr's purported sole general partner, owns 20% of the partner's equity. There are three limited partners who each hold 26.67% of the partnership equity: William P. Eaton, Marilyn J. Eaton, and Lee E. Eaton. William P. and Marilyn J. Eaton are husband and wife. Lee Eaton is William Eaton's brother (Willsyr Ex. 1, p. 1).

58. *Biltmore Forest Broadcasting FM, Inc*. BFBFM, a North Carolina corporation, has three voting stockholders: (1) J. McCarthy Miller, a director and 70% shareholder; (2) Richard Arnold, Vice President, Secretary, Director and 15% shareholder; and (3) Betty W. Gilman, President, Treasurer, Director and 15% shareholder (BFBFM Ex. 1, p. 1).

59. *Skyland Broadcasting Company*. Skyland, a North Carolina corporation, has a two tier ownership structure. It has one *voting* stockholder and eleven *non - voting* stockholders. The sole "regular officer," director, and voting shareholder is Wanda Coleman. She owns 20% of Skyland's equity (Skyland Ex. 1, p. 1).

60. Skyland's non-voting stockholders are: (1) Karl Adkins; (2) Wayne Alexander; (3) William Ferguson: (4) James Ferguson, II; (5) Telezee Foster; (6) Sam Johnson; (7) Darcel Grimes Lloyd; (8) Floyd Young; (9) Melvin Watt; (10) C. J. McGuire; and (11) Phil Henderson. Each of the non-voting stockholders owns an 8% equity interest except C. J. McGuire and Phil Henderson. McGuine and Henderson hold an 8% equity interest jointly. Thus the non-voting stockholders own the other 80% of Skyland's equity (Skyland Ex. 1, p. 1).

61. *Orion Communicaitons Limited*. Orion, a North Carolina corporation, has three stockholders: Zebulon C. Lee is the President, a Director, and 40 shareholder; Betty Lee is a Vice-President, Assistant Secretary Treasurer, a Director, and 30% shareholder; and Brian Lee is a Vice-President, Secretary, a Director, and 30% shareholder. At the hearing Brian Lee testified that the had only contributed about 8% of the monies contributed by the Orion shareholders, but intended ultimately to contribute his full 30% (Tr. 2431, 2521). Zebulon and Betty Lee are husband and wife. Brian Lee is their son.

62. *Harbinger Broadcasting Company*. Harbinger is a North Carolina general partnership. Three partners each own a one-third interest: Terrell Metheny, Carole Metheny, and Christine Longoria. Terrell Metheny and Carol Metheny are husband and wife.

DIVERSIFICATION OF MASS MEDIA

63. *National Communications Industries*. Neither NCI nor Anita Hunter have any attributable ownership interests in any media of mass communications. William Hunter no longer has any such interests. (National Ex. 3).

64. *raKel Communications, Inc*. raKel holds no other broadcast interests. However, Superior (Findings 54-55 *supra*.) is also the sole stockholder of EZY Comm, Inc., the licensee of WLRQ(AM) and WLRQ(FM), Cocoa, Florida.

65. Robert A. Klepper, Elsie L. Klepper, Michael R. Klepper, Kris A. Klepper, Charles D. Hering, Jr. and James C. Pride are officers and directors of EZY Comm, Inc. Also, Pride is the General Manager of WLRQ(AM) and (FM), and Tanya Klepper is the Program Director at those stations.

66. Superior Director William C. Cassell is President of Heidelberg College in Tiffin, Ohio. Heidelberg College is licensee of WHEI(FM), a 15-watt noncommercial campus station.

67. Superior Director Andrew H. Kalnow is a General Partner in Alpha Capital Venture Partners (Alpha). Alpha owns an 8.5% non-voting interest in Channel One Communications, Inc., licensee of KSGM(AM), Chester, Illinois and KSGM(FM), St. Genevieve, Missouri. Superior is a 6% limited partner in Alpha (raKel Ex. 1, p. 3).

68. *Liberty Productions, A Limited Partnership*. Neither Liberty nor either of its partners, Klemmer and Murray, have any ownership interest in any medium of mass communications.

69. *Willsyr Communications Limited Partnership*. William, Marilyn, and Lee Eaton each own 1/3 of the voting stock of Eaton Broadcasting Corporation (EBC). EBC is the licensee of WCRS(AM) and WSCZ(FM). Greenwood, South Carolina. The Eatons acquired these stations in 1982.

70. William Eaton is General Manager of WCRS(AM) and WSCZ(FM). Marilyn Eaton is the Sales Manager. Neither has pledged to divest themselves of either their ownership interest or their employment interest if

Willsyr's application is granted. Sharan Harrison works for the Eatons at WCRS(AM) and WSCZ(FM) as Traffic Manager. She will terminate that position if Willsyr's granted (Willsyr Ex. 2, pp. 1, 4; Tr. 1078, 1080-1081; and 1443.)

71. *Biltmore Forest Broadcasting FM, Inc.* Neither BFBFM, Betty W. Gilman, nor Richard Arnold have any other interests in any medium of mass communications (BFBFM Ex. 3).

72. However, McCarthy Miller (a BFBFM 70% stockholder) owns 51% of M & M Communications, Inc. (M & M). M & M is the permittee of LPTV stations in San Antonio, Texas; Jacksonville, Florida; Fresno, California; and Little Rock, Arkansas. Three of these permits expired after the deadline for filing amendments as a matter of right (Tr. 1580).

73. Miller also owns 100% of MDS of Monroe, Inc. (Monroe MDS). Monroe MDS is the licensee of a single-channel MDS station in Monroe, Louisiana. Monroe MDS also holds a 50% interest in Hartford MDS company, the licensee of a single-channel MDS station in Hartford, Connecticut.

74. Miller also owns 51% of Multi-Communications Services, Inc. (MCS). MCS is the licensee of a single-channel MDS station in Erie, Pennsylvania. MCS is also a minority owner of the MDS license in Miami, Florida and Atlanta, Georgia.

75. Miller, individually and through MCS, owns about a 5% interest in Contemporary Communications Corp. (CCC). CCC is the licensee or permittee of a number of MDS facilities.

76. Miller is also the President of TV Facts, a weekly publication dealing with TV programming.

77. *Skyland Broadcasting Company.* Neither Skyland nor its sole voting stockholder, Wanda Coleman, has any ownership interest in or connection with any existing medium of mass communications.

78. Skyland non-voting shareholders, McGuire, Watt, James Ferguson, Sam Johnson, and Telezee L. Foster all hold voting stock interests in Key West Broadcasting Company (Key West), an applicant for a new FM radio station at Key West, Florida (BPH-870615NE). McGuire holds a 35% voting interest in Key West, Florida. The others hold only a 1% voting interest. Given the fact that McGuire holds *only* the equivalent of a 4% non-voting interest in Skyland, and each of the others only an 8% non-voting interest, the Key West interests just described will not be attributed to Skyland.

79. *Orion Communications Limited.* Neither Orion nor Brian M. Lee holds any ownership interest in any medium of mass communications. Zebulon C. Lee is President, Treasurer, a Director, and owner of 99.6% of Radio Asheville, Inc.'s stock. Radio Asheville is the licensee of WSKY(AM), Asheville, North Carolina (Orion Ex. 1; Tr. 2356). He says he will dispose of his interest in WSKY if Orion is granted.

80. Betty Lee owns 1 share (0.4% of Radio Asheville's stock, and is an officer and director. She will dispose of her interest in WSKY if Orion is granted (Orion Ex. 2; Tr. 2356).

81. Brian Lee, the son, is 30 years old and has worked at WSKY(AM) full time since 1981. He has no ownership in Radio Asheville at all.

82. We will honor Zebulon an Betty Lee's timely divestment pledge and find that Orion has no attributable mass media interests.

83. *Harbinger Broadcasting Company.* Neither Harbinger nor any of its three partners own attributable interest in any medium of mass communications.

84. *Diversification - Intermediate Findings.* When the diversification findings were just made (Findings 63-82 *supra.*) are amalgamated with basic qualifying findings (Findings 9-51 *supra.*), the following intermediate findings are warranted.

85. NCI, Skyland, Orion, and Harbinger are not only basically qualified, they are clean from a diversification stand point (see Findings 63, 77, 79-82, and 83). Accordingly, they will be awarded diversification preferences of varying degrees over the other four applicants: Liberty, BFBFM, raKel, and Willsyr.

86. While Liberty would receive no diversification of mass media demerit (Finding 68 *supra.*), they have been disqualified under either of the two basic qualifying issues (Findings 36-39 *supra.* and 40-51 *supra.*). So their diversification clearance avails them naught.

87. BFBFM is in an equally bad comparative posture. They have been disqualified under the basic qualifying issue that has been designated against them (see Findings 9-15 *supra.*). But even if they were basically qualified, they would be given a *decisionally significant diversification demerit* vis-a-vis NCI, Skyland, Orion and Harbinger because of McCarthy Miller's extensive mass media holdings (see Findings 72-76 *supra.*).

88. *raKel Communications, Inc* raKel has shown itself to be basically qualified (Findings 16-35 *supra.*). However, they will be assigned a *substantial diversification demerit* vis-a-vis NCI, Skyland, Orion, and Harbinger because of the Klepper family's mass media holdings, as well as mass media holdings and/or management positions of Charles D. Hering, Jr., James C. Pride, William C. Cassell, and Andrew H. Kalnow (Findings 64-67 *supra.*).

89. *Willsyr Communications Limited Partnership.* While Willsyr is a basically qualified applicant, it too will be assigned a *substantial diversification demerit* because of William's, Marilyn's and Lee Eaton's ownership interests in WCRS(AM) and WCRS(FM); Greenwood, South Carolina; and William and Marilyn Eaton's management positions at those two stations (Findings 69-70). While Willsyr claims the Eaton's are limited investor's, William Eaton's dominance an control over the General Partner, Sharan Harrison (WCRS' Traffic Manager), is obvious. As a general partner, Ms. Harrison's independence is more illusory than real. So the Eatons' ownership interests must be factored into Willsyr's diversification position, resulting in a substantial diversification demerit vis-a-vis NCI, Skyland, Orion and Harbinger.

90. So, as we turn to the Commission's second comparative objective; i.e., determining which applicant will offer the best practicable service to the public, we see that Liberty and BFBFM are eliminated from any comparative consideration.[18] We also see that NCI, Skyland, Orion and Harbinger are entitled to *substantial diversification preferences* over raKel and Willsyr. Stated simply, as we turn to the best practicable service objective, raKel and Willsyr trail the field very badly.

BEST PRACTICABLE SERVICE

91. *Comparative Coverage*. Under the HDO, we must consider comparative coverage (see Findings 3 *supra*.). The following chart depicts the areas and populations that each of the eight applicants will over within their 1 mV/m contours (see Jt. Ex. received June 13, 1989; Tr. 63).

CHART

Applicant	Area (Sq. Km)	Population
National Communications, Industries	1,777	186,625
raKel Communications, Inc.	1,460	168,439
Liberty Productions	1,791	184,250
Willsyr Communicatins Limited Partnership	1,768	181,348
BFBFM	1,781	181,348
Skyland Broadcasting Company	1,779	184,250
Orion Communications Limited	1,790	184,250
Harbinger Broadcasting Limited	2,355	215,037

92. All proposed service areas presently receive five or more aural services, so none of the applicants will provide service to any underserved areas.

93. *Intermediate Facts*. When areas and populations are well-served, the Commisison has awarded a slight coverage preference to applicants who propose substantially greater overall coverage than their opponents (*Simon Geller*, 90 FCC 2d 250, 268-269, 276 (1982), coverage superiority of our times more area and 315,000). For less significant differences, a very slight preference has been awarded. *Barton Broadcasting, Inc.*, 104 FCC 2d 785, 791 (Rev. Bd. 1986) coverage difference of 44, 215 persons or 27%); *Family Broadcasting Group*, 93 FCC 2d 771, 779 (Rev. Bd. 1983) (coverage differences of 42,000 people - 8%; 140,000 people - 34%; and 180,000 people - 44%). Where coverage differences are insignificant, no preference is awarded. *Susan S. Mulkey*, 4 FCC Rcd 5520, 5521 (1989) (coverage difference of 36,206 people - 2%; *Barnes Enterprises, Inc.*, 69 FCC 2d 1957, 1962-1963 (Rv. Bd. 1978), *review denied*, FCC 79-451, released July 15, 1979 (coverage difference of 12,000 people - 5%).

94. Based on the foregoing, Harbinger merits a very slight preference over all the other applicants (coverage differences varying between 30,787 people (17%) over Orion, Liberty, and Skyland, and 46,958 people (28%) more than raKel). The remaining applicant (excluding raKel) also merit a very slight preference over raKel (Orion, Liberty, and Skyland will serve 15,811 people (9%) more than raKel). The applicants other than Harbinger and raKel merit no preference vis-a-vis each other.

95. *Integration of Ownership With Management - An Overview*. Five of the eight remaining applicants claim 100% quantitative integration: Liberty, Willsyr, Skyland, Orion, and Harbinger; NCI claims 97%, but raKel only claims 70.47% quantitative integration, and BFBFM only 15%. Under Commission precedent raKel's (70.47%) and BFBFM's (15%) quantitative claims are woefully inadequate. So unless they can reduce *all six* of their opponents' quantitative claims to within 10 percentage points of their own claim, they would not be entitled to any qualitative comparative analysis; nor would they be entitled to minority and or female enhancement.[19] *See New Continental Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (1981); *Van Buren Community Service*, 87 FCC 2d 1018, 50 RR 2d 115 (1981); and *Cannon Point Broadcasting Co.*, 93 FCC 2d 643 (Rev. Bd. 1983) at 649.

96. So *assuming* that raKel wouldn't receive a substantial diversification demerit (but see Findings 64-67 and 88 *supra*.), it still faces a long uphill battle on quantitative integration. Similarly *assuming* that BFBFM were basically qualified (but see Findings 9-15), and further *assuming* that they wouldn't receive a decisionally significant diversification demerit, they too face a long uphill battle on quantitative integration.

97. *National Communications Industries* NCI seeks 97% quantitative integration. They intend to integrate their president and 97% stockholder, Anita Hunter, into the proposed stations day-to-day operation. Ms. Hunter proposes to serve full-time as the proposed station's general manager. In that capacity she will develop the station's overall policies on sales, personnel, programming, finances, employment and community relations (NCI Ex. 2, p. 1).

98. However, NCI's opponents have established that, at the very moot,[20] NCI is entitled to 50% quantitative integration credit. Despite the nominal 97%-3% ownership split, both Anita, Hunter and William Hunter acknowledge that each of them is a 50% beneficial owner of NCI.

99. Anita Hunter testified that regardless of what was presented to the FCC they (she and William Hunter) would each be 50% owners because the station " . . . would be run jointly, and when it started making money, it was joint money." (Tr. 295-296). She further stated that Mr. Hunter would be entitled to 50% of the station's profits (Tr. 296) and that 50% of the station will go to him when their pending divorce becomes final.[21] (Tr. 329-330).

100. William Hunter expressed the same view. When asked if he would claim 50% of the station's profits, and 50% of the gain on a sale, Mr. Hunter said (Willsyr Ex. 3, p. 75):

> "Absolutely. You have been asking me questions all day where did the money come from. It came from both of us. What do I do now? Give it up and say it's all yours, forget about it? . . . No thanks, counsel."

101. In addition the background circumstances underlying NCI's filing bely the ostensible 97%-3% split in favor of Anita Hunter. Anita Hunter has never been involved in broadcasting before. Originally she worked for nine years in Las Vegas as a blackjack dealer. She broke

in at the Golden Nugget, downtown. Later she worked as a dealer at the Flamingo Hilton, up on the Strip (Tr. 237-239, 247).

102. By contrast, William Hunter spent 12 years in broadcasting (from 1967-1979), principally as the owner of a radio station in Florida. After he left broadcasting, he frequently talked about getting back into the business. When he learned that the Biltmore Forest frequency was available, he decided to do so. He picked Biltmore Forest because he believed that a station in that market would be valuable (Willsyr Ex. 3, pp. 6-10, 20; Tr. 246).

103. The reason he decided to give almost all the stock to Anita Hunter was because she was an Hispanic female. He said "I'm not going to go against what Congress decrees or what the FCC decrees. If that's what they want, I will be more than happy to give it to them."[22] (Willsyr Ex. 3, p. 30).

104. As noted previously, the idea of filing for the Biltmore FM frequency originated with William Hunter (Finding 101 *supra*.). He was heavily involved in the application process; he initially contacted communications counsel and an engineering consultant (Tr. 244, 249, 251-252). He went to North Carolina with his wife to locate a transmitter site, handled communications with the engineer, and prepared the cost estimates for the financial certification (Tr. 256-257, 269). He has continued to communicate with NCI's counsel since the application was filed; and he has participated in decisions to amend NCI's application and to file a motion to enlarge against one of the competing applicants. Once the station becomes operational, William Hunter intends to advise Anita, Hunter on any questions she might have (Willsyr Ex. 3, pp. 58-60, and 82-83).

105. William Hunter is fully cognizant of the control he would exercise over the proposed station's operations. As he puts it: "A station makes money only one way, only one way, it sells advertising, and without advertising, she [Anita Hunter] would be Chairman of the Board and everything, but it means nothing." (Willsyr Ex. 3, p. 36). When she was asked if, under NCI's integration proposal, she would have been supervising William Hunter, she said, "Yes, technically" (Tr. 343).

106. Anita Hunter, an Hispanic female, was born on October 3, 1936 in San Antonio, Texas. She currently resides in Las Vegas, Nevada, but says she'll move to Biltmore Forest if NCI is granted.[23]

107. Ms. Hunter has no broadcast experience, but she does have some business experience. In addition to experience dealing blackjack (Finding 100 *supra*.), Ms. Hunter managed an apartment complex from May 1983 to October 1983 (Tr. 339-340). From 1984-1988, she ran the office of William Hunter and Associates, an income tax preparation service. Her husband, William Hunter, prepared tax returns for his clients and represented them before the Internal Revenue Service. Anita Hunter supervised two employees, reorganized the firm's business operations, and set up a billing system.

108. In 1988, in order to enter a field of her own, and because of disputes she was having with her husband, she left William Hunter and Associates. She currently is the Personnel Assistant to the Presiding of the Baskow Agency, a talent agency. Anita Hunter cannot claim civic participation.

109. *raKel Communications Inc.* raKel claims 70.47% quantitative integration. They say they intend to integrate Robert A. Klepper, their Chairman of the Board, Director, Chief Executive Officer, and 70.47% stockholder the proposed station's day-to-day operations. Robert Klepper proposes to serve full-time as General Manager of the proposed station. In that capacity Mr. Klepper will establish overall station policy, take the responsibility for the day-to-day management and station operation, implement the station's Model EEO program, and bear the ultimate responsibility for station compliance with the FCC Rules an Regulations.

110. There is serious doubt that raKel will carry out its 70.47% integration pledge. Robert Klepper does not intend to relocate to Biltmore Forest, North Carolina. Since he moved from Tiffin, Ohio, he has established a legal and winter residence in Key Largo, Florida (Tr. 578, 588, 608). While he has a summer home in Linville, North Carolina, that community is some 60 miles from Ashville. Mr. Klepper presently spends only 10 to 12 hours a week on the family businesses. He cut his active involvement in those businesses back in 1984. He now relies largely on his sons for the active management of them (Tr. 581, 585-586, 604-605). On cross-examination he conceded that his son Michael had born the primary responsibility for the Biltmore Forest application (Tr. 597-598, 601).

111. Mr. Klepper also relied on a manager to operate his Florida radio stations; and he oversaw a management team for an Ohio radio station he previously owned.

112. *raKel - Intermediate Findings*. Based on Findings 109-111 *supra*., the intermediate finding is warranted that raKel will not carry out its integration proposal; i.e., they will not integrate Robert Klepper full-time (at least 40 hours a week) into the proposed Biltmore Forest operation. So raKel will be awarded 0% quantitative integration. When this 0% integration award is combined with their substantial diversification demerit (Findings 64-67 and 88), raKel is out of the comparative race entirely.

113. *Liberty Productions, A Limited Partnership*. Liberty claims and will be accorded 100% quantitative integration they have shown themselves to be a *bona fide* North Carolina limited partnership. They intend to integrate their general partner, Valerie Klemmer, full-time (at least 40 hours a week) into the proposed station's day-to-day operation. Ms. Klemmer, who holds 35% of the partnership's equity would serve as the station's General Manager.

114. As general manager Ms. Klemmer will supervise all phases of the station's operation' she will supervise the performance of all station employees; and all management-level employees will report directly to her. She will oversee the continuing ascertainment of community needs and interests, formulate programming in response to those needs and interests, formulate station policy, and assure station compliance with the FCC's Rules and Regulations (Liberty Ex. 2 p. 1).

115. A White, nonhispanic female, Ms. Klemmer has resided in Ashville, North Carolina since 1985. Her residence is within the proposed station's 1 mV/m contour. If Liberty's application is granted, she will continue to reside in the service area. She is currently not employed out side the home. But if Liberty is granted, she will terminate any employment she may have taken in order to effectuate her integration proposal.

116. Valerie Klemmer attended Universidad de Madrid in Madrid, Spain from August 1975 to June 1976. In 1976-1977 she attended Rider College in Trenton, New Jersey where she received her BA degree with a major in Spanish. She received her master of Arts in Spanish from the University of Georgia in 1979.

117. She has no broadcast experience, but she does have some business experience. From 1973-1975, she was a research assistant for E. R. Squibb and Sons, Inc., in Princeton, New Jersey; from 1977-1079, she was a Teaching Assistant at the University of Georgia; and from 1979-1982 she was the Administrator for the Stanley H. Kaplan Educational Center in Athens, Georgia. From January 1986 to May 1987, she was a Spanish instructor for West Carolina University; and from the fall, 1986 to spring, 1988, Ms. Klemmer was also employed part-time by the University of North Carolina, Asheville as a Spanish Adjunct Instructor.

118. Valerie Klemmer can claim local civic participation. She has been a member of the local (western North Carolina) chapter of the Sierra Club; since 1987 she has been a member of the Asheville Symphony Guild, and successfully worked to have the Chestnut-Liberty Historic District designated a Local Historic District. In 1988, she was a local volunteer in the congressional campaign of Congressman James Clarke.

119. *Liberty - Intermediate Findings. Assuming* that Liberty were basically qualified (but see Findings 36-39 *supra*., and 40-51 *supra*.), it would be entitled to the 100% quantitative integration it claims (see Findings 113-118 *supra*.).

120. *Willsyr Communications Limited Partnership.* Willsyr claims 100% quantitative integration. They say that they will integrate their general partner, Sharon Harrison into the proposed station's day-to-day management. Harrison, who ostensibly holds 20%,[24] would be the full-time (at least 40 hours a week) General Manager.

121. Willsyr could receive at the very most a quantitative integration credit of 20%. They have failed to demonstrate that they are a *bona fide* limited partnership. In fact, the record shows just the opposite; i.e. that Sharan Harrison is a mere figure head for William, Marilyn and Lee Eaton, Willsyr's limited partners. *See* Findings 57 and 69-70 *supra*.

122. As previously found the Eatons own Radio Stations WCRS(AM) and WSCZ(FM), Greenwood, South Carolina. William Eaton is the General Manager of those stations, and his wife Marilyn Eaton is Sales Manager (Tr. 1081).

123. William Eaton is an experienced broadcaster. Before he acquired his Greenwood stations in 1982, he served for four or five years as Vice President of operations for LIN Broadcasting, licensee of several major market radio and television stations (Tr. 1443-1445). In that position he directly supervised the managers of each of LIN's stations. Before that he worked 23 years for Rollins. The last six or seven years with Rollins Eaton was Vice President of Television and Cable. He oversaw the operation of three television stations and two cable systems (Tr. 1445-1446).

124. William Eaton learned that the Biltmore Forest frequency was available when he tried to upgrade WSCZ-FM to a Class 2 station. He discussed the subject with his wife and brother Lee. They decided to apply for Biltmore Forest and thus expand their broadcast holdings. William Eaton was aware that in comparative hearings the FCC awards preferences for minority and female participation (Tr. 1453).

125. Sharon Harrison, a Black female, has been employed as Traffic Manager and Office Manager at WCRS/WSCZ since the Eatons bought those stations in 1982. In those capacities she has worked on sales projections, helped the sales staff with various projects, assisted with the bookkeeping, handled billing, and reconciled billing with the logs. She has progressed from her entry level position as Traffic Manager. But she still does not supervise other employees, and she has never served as a department head.

126. About a month before the Biltmore Forest filing deadline, William Eaton told Ms. Harrison that the Eatons were considering funding an application for Biltmore Forest as uninvolved participants and wanted to know if she'd be interested (Tr. 1459-1460). This was the first time Ms. Harrison had heard of the Biltmore Forest allotment (Tr. 1081). She had never expressed an interest in owning her own station or applying to the FCC for a license, and she knew nothing about the process (Tr. 1082-1083). But she did know that Eaton was interested in acquiring additional broadcast stations. Eaton also made a remark that if she was interested, he would provide the financing. She said she would have to think about it. She understood that if she applied, it would be by herself (i.e. as an individual) (Tr. 1092).

127. Some seven to ten days later Eaton and Harrison had a second conversation on the subject. At this meeting she learned that she would have to leave Greenwood to obtain the station (Tr. 1089-1090).[25] She indicated to Mr. Eaton that she was interested but still uncertain. She knew that running the station would be a "big responsibility," far greater than anything she had ever had to handle (Tr. 1091).

128. Eaton and Harrison met a third time during the first week of August 1987. At the outset Harrison told Eaton she would apply (Tr. 1092-1093). Up to this point there had been no discussion of the expected costs involved in the application, and she had no idea of how financing would be provided to her; i.e., via gifts or loans or in some other form. But it was during this third meeting that she realized she would have partners in the project. She also understood that regarding station ownership "part of it possible would be mine" (Tr. 1092-1099; 1101-1102). Although she had agreed to file the application there was no discussion of how much she would own.

129. At that point she didn't know how many radio stations were licensed to that area; she had no idea whether it was a suitable or desirable market; and she knew nothing about the area's economic base (Tr. 1141-1143). In fact, even by the time of the hearing, the most she could say about Biltmore Forest was that "it's very pretty" (Tr. 1143).

130. Later, Willsyr's present counsel (Mr. Yelverton) indicated to her that her ownership interest in the proposed station would be 20%. She thought that "it seemed pretty fair to me." (Tr. 1098, 1158).

131. Ms. Harrison has paid no money for her share of the equity. The Eatons have funded her portion of the expenses. While nominally in the form of loans from the Eatons to Harrison, this arrangement amounts to nothing more than a carried interest. William Eaton never looked

at a balance sheet or financial statement for Ms. Harrison and never asked her for any personal information. He knew she has no cash assets or property, and so he never asked for any security for the loans (Tr. 1184-1185, 1367-1368; 1541-1543; NCI Ex. 28, p. 47).

132. Mr. Eaton further concedes that any repayment by Ms. Harrison "would probably be a very slow process." (Tr. 1486). In fact, the whole financial relationship between the Eatons and Ms. Harrison has a certain vagueness about it. For instance, Ms. Harrison signed promissory notes for $1,000 to each of the Eatons in August, 1987. Those notes were drafted by William Eaton and she didn't negotiate for any of the terms (raKel Ex. 20, 21; Tr. 1180). Subsequent loans were made to Ms. Harrison without promissory notes. As she puts it "[w]e just didn't bother to do any." (Tr. 1185). Apparently trying to cure these failures, William Eaton typed up an agreement, and Ms. Harrison signed it in June 1989. Under that agreement she is obligated to reply the 20% funds that the Eatons provide on the same terms and conditions specified in the August 1987 promissory notes (raKel Ex. 23; Tr. 1327-1328; 1333-1334). William Eaton concedes that if Willsyr doesn't win the permit Harrison would be unable to repay the notes in the lump sum called for by the notes (Tr. 1522).

133. Ms. Harrison hasn't kept track of how much she owes the Eatons. At the hearing her best estimate was "several thousand dollars" (Tr. 1187).

134. Although Ms. Harrison purports to be Willsyr's sole general partner, when it comes to finances she simply follows the limited partner's directions. For example, she executed an $8,000 promissory note on behalf of te partnership in January, 1989, on a loan form Lee Eaton. Lee Eaton had drafted the promissory note and sent it to Ms. Harrison along with a loan check. Ms. Harrison has no idea why the partnership is obligated to pay "on demand" rather than at a specified time as her own August 1987 notes provide (Tr. 1321-1322).

135. On August 20, 1987, Harrison opened a partnership bank account at the South Carolina National Bank. William Eaton drove her to the bank and introduced her to a banker he knew (Tr. 1545). The partnership account authorization that Harrison filled out of the bank names all three Eatons as Willsyr general partners (Tr. 1155). All four of Willsyr's principals signed the authorization, but this "error" was apparently never noticed or corrected (raKel Ex. 18).

136. As general partner, it is Ms. Harrison's duty to pay the partnership bills. When she needs funds, she advises William Eaton, and he arranges to obtain the funds by contacting his brother (Tr. 1495-1496).

137. raKel Exhibit 24 is the bank letter Willsyr relies on. It is dated August 25, 1987, is signed by John Trier, Assistant Vice President of the First Security Bank in Lexington, Kentucky, and is addressed to William P. Eaton. Lee Eaton is a member of the board of Directors of that Bank (Tr. 1479-1480). It was William Eaton who made the direct contact with John Trier. William Eaton concedes that Trier believes the loan was being made to the Eatons.

138. Ms. Harrison had no role in obtaining the commitment letter from First Security. While the letter refers to William, Marilyn and Lee Eaton, there is no reference to Sharan Harrison or that there would be a managing partner. Nor does the letter even reflect what kind of partnership is involved (1481-1485).

139. Sharan Harrison was born June 13, 1956. She has an Associate of Arts degree from Piedmont Technical College, Greenwood, South Carolina. Although she presently resides in Greenwood, she intends to move to Biltmore Forest if her application is granted.

140. Ms. Harrison intends to be integrated full-time (at least 40 hours a week) as General Manager of the proposed FM station. In that capacity she intends to direct the overall operation, set general policies to govern the financial, administrative and employment aspects of the operation, and set and oversee the stations programming policies. She will hire and fire station employees, and administer and implement the station's EEO policy. She will also oversee the station's public relations and community outreach efforts.[26] If Willsyr is awarded the CP, Ms. Harrison intends to move to the Biltmore Forest area and reside within the proposed station's city-grade contour.

141. Sharon Harrison's broadcast experience has been set out previously (Finding 125 *supra*.). Since she is a resident of Greenwood, South Carolina, she can claim no local civic participation. She claims integration enhancement for being a Black female.

142. *Willsyr - Intermediate Findings*. Based on Findings 120-141 *supra*., the record demonstrats that Willsyr is entitled to 0% quantitative integration credit. In order to further their broadcast ownership ambitions' the Eatons' (principally via William Eaton) constructed a "sham" application. William Eaton selected for "window dress" an ersatz general partner, Sharan Harrison, one of his employees at his AM and FM stations in Greenwood, South Carolina. He chose Harrison because he was aware that her minority and female status would prove beneficial. He cast her in the role of general partner, and the Eatons as limited partners so he could avoid having the Eaton's ownership of their Greenwood stations becoming a comparative disadvantage. In addition, he knew that Sharan Harrison could be easily controlled since she had no funds of her own. She could be early guided, and she has been for the last eight years as an Eaton employee.

143. So even *assuming* that Willsyr was not be assessed a substantial diversification demerit (Findings 69-70, 87-88 *supra*.), they would be out of its comparatively based on their 0% quantitative integration credit.

144. *Biltmore Forest Broadcasting FM, Inc* BFBFM claims *only* 15% quantitative integration. So even if they were basically qualified (but see Findings 9-15 *supra*.) and even if they had not been assessed a decisionally significant diversification amendment (but see Findings 71-75 and 85 *supra*.), they would be eliminated from further comparative consideration because of their weak (15%) quantitative integration claim.

145. BFBFM proposes to integrate their president, treasurer, director and 15% stockholder Betty Gilman full-time into the station's day-to-day operations. Mrs. Gilman will spend forty hours a week as the station's Sales/Business Manager. In that capacity she will direct sales efforts, hire, fire and supervise all sales personnel, handle station promotions, and supervise account collections. She will also oversee the station's books of account and will monitor accounts payable, receivables, payroll, and banking transactions.

146. Betty Gilman was born in 1928 (Tr. 1557). She is not currently employed except for the occasional sale of art work, which requires no more than 2 hours of her time per week. She has resided in Ashville, North Carolina (within the proposed station's service contour and will continue to live there if BFBFM receives a grant (BFBFM Ex. 2).

147. Mrs. Gilman wasn't a member of the application when it was first filed on August 31, 1987 (Tr. 1558). The original principals were McCarthy Miller and June Miller. Mrs. Gilman was added to the application by an amendment in November 1987. She was originally specified as the Treasurer and Director of BFBFM (Tr. 1559). She had no role in the preparation of that amendment, and didn't see it until after it had been filed with the Commission (Tr. 1559-1561). At the time she joined the application, there were no discussions about the responsibilities she might have at the station. However, McCarthy Miller told her that she would not have any financial responsibilities. He was interested in having Mrs. Gilman as a principal because she is a local resident (Tr. 1561-1562).

148. In early 1989, Mrs. Gilman became president of the corporation (Tr. 1563). She is responsible for paying the applicant's bills out of a corporate checking account (Tr. 1567). But corporate invoices are sent to Miller. Once he approves a bill he forwards it to Gilman for payment (Tr. 1569).

149. Ms. Gilman admits she doesn't have the experience to be the station's general manager. But she hasn't decided whether to hire a general manager. She agrees, however, that a general manager would supervise and control all aspects of the business, including sales.

150. Betty Gilman claims integration enhancement for being a female. She also claims to be a registered member of the Eastern Band of the Cherokee Indian Tribe. But the record contains no documentary evidence of such tribal affiliation, and no evidence about Mrs. Gilman's relationship with that tribe, or their activities.

151. *BFBFM - Intermediate Findings*. BFBFM will receive no quantitative integration. To credit them with Mrs. Gilman's 15% would be to allow a comparative upgrading in direct violation of the Hearing Designation Order. *See* 54 F.R. 3847 released January 18, 1989, at paras. 12 and 20. Moreover, BFBFM's integration proposal, such as it is, is flimsy and lacks credibility.

152. *Skyland Broadcasting Company*. As previously found, Skyland is a two-tier corporation; i.e., one with both voting and non-voting stock. The voting stockholder, Wanda Coleman, owns 20% of the equity. The non-voting stockholders and their equity interest is set out at finding 60 *supra*. [27]

153. Skyland claims 100% quantitative integration. They intend to fully integrate Wanda Coleman into the proposed station's day-to-day operation. She will devote at least 40 hours a week to the station's general manager. In that capacity she will make all the decisions affecting the station, including all long-range policy matters an all significant financial decisions. She will supervise all aspects of the station's operations. That includes programming and staffing. She will hire and supervise all department heads, and implement the station's equal employment opportunity program. To effectuate her integration proposal, Ms. Coleman will resign her current position as Executive Director of YMI Cultural Center, Inc. (YMI) in Asheville, and will reduce her involvement or if necessary terminate her involvement at YMI entirely (Sklyand Ex. 2).

154. Although, as found *infra*., Ms. Coleman is a *bona fide* general manager, Skyland will only be credited with 76% quantitative integration. Their opponents have successfully demonstrated that at least three[28] of the 8% non-voting stockholders have not sufficiently insulated themselves from Skyland's operations as to be considered passive investors.

155. Those three non-voting 8% stockholders are: James E. Ferguson II, Melvin Watt, and Karl Adkins. All three are members of the Charlotte, North Carolina law firm of Ferguson, Stein, Watt, Wallas and Adkins (Skyland Ex. 1, para. 3; Tr. 2274, 2309, 2836, 2877), Mr. Ferguson is the senior partner of the firm (Tr. 2837), and Mr. Watt is the Managing Partner (Tr. 2903-2904). Collectively, Ferguson, Watt and Adkins own 24% of Skyland's equity.

156. Since Skyland's inception, Ferguson, Stein, has been their local counsel (Tr. 2881 2902). Melvin Watt is the principal member of the firm who works on Skyland's legal matters (Tr. 2889). It was Watt who drafted and signed Skyland's articles of Incorporation as the incorporator (Skyland Ex. 1, pp. 7-8; Tr. 2111, 2269, 2308); he drafted Skyland's By-laws (Tr. 2269); he prepared the stock subscription agreements (Tr. 2196); he prepares the stock certificates (Tr. 2268, 2296, 2319-2320); he prepares the corporate minutes an corporate resolutions (Willsyr Ex. 13; Tr. 2118, 2203, 2269, 2293-2294); and he has drafted a Statement of Classification of Shares (Skyland Ex. 1, pp.22-24; Tr. 2302-2303).

157. Not only has Mr. Watt prepared Skyland's corporate and legal documents, he also counsels and advices Skyland on important legal questions. For example, at the outset he recommended that Skyland be formed as a corporation rather than a partnership (Tr. 2284). Later he gave advice on how to restructure the corporation to convert some of the original voting stockholders to non-voting (Tr. 1854, 1865). He also provides advice about general corporate matters (Tr. 2230, 2307-2308).

158. Not only is Ferguson, Stein Skyland's local counsel (Finding 155 *supra*.), the firm advanced Skyland's $1,800 FCC application filing fee as well as its corporate filing fee as well as its corporate filing expenses (Tr. 1788-1789; 2876-2877).

159. Ferguson, Stein's senior partner, James E. Ferguson II was the prime mover behind Skyland's application. It was his idea initially to file for the Biltmore Forest Frequency, and he took the lead in the contacting others who might be interested in pursuing it (Tr. 2840). It was Ferguson who recruited Wanda Coleman, who later became and is now Skyland' sole voting stockholder (Tr. 2007, 2863-2864). Ferguson was the "lead person" at the prospective participants' initial meeting. That meeting and many of the subsequent meetings have been held at Ferguson, Stein's law offices (Tr. 1602-1603, 1623, 1629, 1766, 1864, 2009, 2011).

160. Wanda Coleman, Skyland's voting stockholder consults with Messrs. Ferguson and Watt and relies on their legal advice (Tr. 2120-2121, 2212, 2230).

161. Based on Findings 154-160 *supra*., the intermediate finding is warranted that Skyland has failed to demonstrate that three of their non-voting stockholders are sufficiently passive, and therefore their combined 24% ownership must be factored into Skyland's integration

claim. Since they will not be integrated into the station's day-to-day operations, their 24% ownership must be subtracted from Skyland's 100% claim.

162. Wanda Coleman was born on October 26, 1947 in Asheville, North Carolina. Except for the years 1966-1972 and 1978-1983 when she resided outside of Asheville while attending college and graduate school, she has lived in Asheville all her life. Asheville is wholly within the 1.0 mV/m service contour of Skyland's proposed station (Skyland Ex. 2).

163. Ms. Coleman received a Master of Social Sciences degree from Bryn Mawer College, Bryn Mawer, Pennsylvania in 1972. She received a Master of Public Administration degree from the University of North Carolina, Chapel Hill in 1981 and went on to pursue doctoral studies. She has completed the classroom studies for her doctorate, but hasn't yet completed her dissertation (Skyland Ex. 2).

164. Wanda Coleman has some limited broadcast experience, but excellent administrative experience. From the spring of 1984 to December 1985, she was the volunteer Public Affairs Director for noncommercial station WKDB(FM), then WBMU-FM in Ahseville. In that position, she produce a public affairs show once every week and reviewed the station's ascertainment efforts and other public affairs programming. She is a member of the Citizens Advisory Board for WCQS(FM), a noncommercial FM station in Asheville. The Board meets annual with the station's Board of Directors to advise on how the station can better serve the community. She has been a member for two terms, 1987-1988 and 1988-1989.

165. From May 1972 to January 1974, Ms. Coleman was the Director of the Evaluation and Research Department of the Model Cities Agency in Ashevill, a poverty agency which provided numerous social programs. During the 1973-1974 academic year she was a Sociology Department Lecturer at the University of North Carolina, Asheville.

166. She worked as an Urban Planner in the Planning Department of the city of Asheville from January, 1974 to August, 1978; from August 1978 to December, 1982, when she was engaged in graduate studies at UNC, she worked as a Teacher Assistant in UNC's Political Science Department.

167. In January, 1983, she returned to Asheville and became YMI's Program Director. YMI, a nonprofit agency, promotes economic development, cultural development and community education focusing on the Black community. Part of YMI's work includes helping develop business plans for new enterprises. After about a year at YMI (in October, 1984), Ms. Coleman was promoted to Executive Director of YMI. As Executive Director, she oversees all of the agency's operation, including its programs and fund raising. She supervises YMI's five-person staff.

168. Wanda Coleman has local civic activities. Since 1986 she has been a member of the Asheville Planning and Zoning Commission. She has been a member of the Board of Directors of N.C. Equity, a statewide women's organization. She has served as a Director of the United Way, Asheville Chapter for four years. From 1985 to 1987 she was a member of the State Council on Adolescent Pregnancy.

169. Since 1985: Ms. Coleman has been on the Board of Directors of The Bele Chere Festival in Asheville, a city-wide cultural event; and a member of the Board of Directors of the Community Arts Council of Western North Carolina in Asheville, Since 1986 she has been on the Steering Committee of Asheville's annual Martin Luther King, Jr.'s Prayer Breakfast held in January each year.

170. Ms. Coleman has also done stints on the Planned Parenthood Board of Directors, Asheville City Schools Advisory Board, and Asheville YWCA Board of Directors. She has been a member of the Association of Black Social Workers since 1985, and member of the Masters of Public Administration Alumni Association.

171. Wanda Coleman seeks enchancement of her integration claim for being a Black female.

172. *Orion Communications Limited.* Orion claims 100% quantitative integration. They intend to integrate all three of their stockholders into the day-to-day operation of the proposed station.

173. First they intend to fully integrate their president, director, and 40% shareholder, *Zebulon Lee* into the proposed station's day-to-day operations. Lee will work full-time (at least 40 hours a week) as General Manger. In that capacity, he will supervise all the station's operations, establish and implement station policies, supervise and coordinate all department heads, and generally supervise all station employees. He will terminate his current employment with Station WSKY(AM)[29] if Orion is granted.

174. Except for an 11-month period in 1941-1942, and 39 months of military service, Zeb Lee has lived in Asheville continuously since 1938. Asheville is within Orion's proposed service area. He intends to continue residing in Asheville if Orion's application is granted (Orion Ex. 1).

175. Zebulon Lee was born in Monterey, Tennessee on April 18, 1911. He graduate from Milton Union High School in West Milton, Ohio in 1928. He attended Miami University at Oxford, Ohio and Wittenberg College in Springfield, Ohio. Then in November 1938, he moved to Asheville.

176. Lee has a wealth of broadcast experience. From October 1939 to October 1941, he worked as an on-air announcer at station WISE(AM), Asheville; from October 1941 through approximately September 1942 he worked for WOTF(AM) in Raleigh, North Carolina as an announcer, sports caster, and news announcer. The Army Air Corp recruited him in October 1942 specifically to work in radio. He was stationed at Greenville (South Carolina) Army Air Base. There he planned, wrote, rehearsed, produced and broadcast regularly scheduled programs which were carried over WFBC(AM), Greenville, and picked up and carried by other stations. He served in this capacity for 39 months.

177. In December 1945, Mr. Lee returned to Asheville and applied for an AM station on 1490 kHz, and in 1946 the FCC awarded a license to Radio Asheville, Inc., owned by Mr. Lee and Carl Bamford. The station, WSKY(AM) at 100 watts on 1490 KHz went on the air on April 11, 1974. When Mr. Bamford died in 1953, Zebulon Lee became the 100% owner of WSKY. Later he transferred one share of Radio Asheville stock (0.4%) to his wife, Betty. He still owns 99.6% of the company. WSKY currently operates on 1230 KHz at 1000 watts.

178. Lee has managed WSKY(AM) continuously since it went on the air in 1947. He has announced more than 3500 football and basketball games during his career. He was the first broadcasters in the Asheville area to broadcast play-by-play coverage of local high school and college football and basketball games. For 18 years Lee broadcast "Open Mike", a 30-minute daily "Man-on-the-Street" interview program. In addition to being WSKY's full-time General Manager, Lee writes, produces, and announces a 20-minute daily sports commentary, and does the play-by-play for about 30 local ball games per year. The Asheville Chamber of Commerce offers annually the "Zeb Lee Scholastic Award" to an outstanding student athlete in the area. In 1970 Mr. Lee was awarded the City of Asheville's Superior Performance Award "for outstanding service as a sports announcer."

179. Zebulon Lee has been a Mason since 1932, and has been a Shriner since 1956, although he hasn't been real active in the Shriner's since 1984 or 1985. In 1988 he was appointed a lifetime member of the Asheville High Booster Club. He is a White, nonhispanic male.

180. Orion's opponents have leveled an attack on the *quality* of Zebulon Lee's integration; more specifically they have attacked the quality of Mr. Lee's past broadcast experience. They base their attack on two incidents.

181. The first was a 1977 action on which Radio Asheville, Inc. (WSKY) conceded that it had violated the Fair Labor Standards Act an agreed to pay $5,599.31 in back wages to certain sales people. That attack is rejected. The record shows that WSKY (Zeb Lee) made an honest mistake and that he rectified that mistake and paid the people with penalty imposed by the Wage and Hour District Manager (Tr. 2361, 2363-2365).

182. The second incident involved a contract dispute between WSKY and ASCAP in 1985. That was settled by a consent judgment for $10,412. That attack is also rejected. Zebulon Lee has satisfactorily explained the facts behind this altercation (Harbinger Ex. 13; Tr. 2367-2369).

183. But even assuming that Zebulon Lee had not adequately explained the facts underlying these two legal actions, no comparative demerit would be assessed against the quality of Mr. Lee's broadcast experience. In fact, and putting aside Zeb Lee's broadcast experience prior to April 11, 1974 (when WSKY went on the air), these two isolated incidents only highlight the pragmatic excellent quality of his integration. A broadcaster who only has two minor altercations over 42 years of broadcast ownership has displayed splendid stewardship. Zebulon Lee's 40% quantitative integration claim will be fully credited.

184. Next, Orion intends to fully integrate their Vice-President, Assistant Secretary, Treasurer, Director and 30% stockholder *Betty W. Lee* into the proposed station's day-to-day operations. She will work full-time (a minimum of 40 hours per week) as Director of Public Affairs and Public Service. In that capacity she will develop and carry out station policies on public service programming. She will ascertain local needs and problems, plan and coordinate station public service activities and plan and coordinate programs responsive to issues of concern in the station's service area.

185. Mrs. Lee moved to Asheville in 1938 at the age of six. She has resided in Asheville (within the proposed station's service area) continuously ever since. She plans to continue to so reside if Orion is granted. She graduated from Woodfin High School in Asheville in 1950, and from Cecil's Business School in 1951. On September 6, 1956, she married Zebulon Lee.

186. Betty W. Lee has broadcast experience. In about 1957 Mrs. Lee began working part-time at WSKY(AM). She continued working part-time on and off through 1958. She did traffic, correspondence and general office work. She discontinued working in 1958, and didn't resume until about 1965.

187. About 1965 she resumed her part-time work at WSKY, and did so off and on through 1976. Her duties during that period included traffic, copy, collections, and general office work. In 1977 she started working full-time at WSKY, and has worked full-time continuously ever since. She began as a copy writer, but over the years she has expanded her duties to include production and production management, management of public service programming and affairs, and assistance to the station's general manager in various phases of station operations (Orion Ex. 2).

188. Mrs. Lee has a limited amount of civic participation. In 1970 she helped organize and was a charter member of the Leaf and Petal Club, and remained a member until 1979. That club promotes the beautification of Asheville, and supports programs that educate children on the value of gardens and nature. She also served as a volunteer librarian and substitute teacher at Jones Elementary School in Asheville between 1965 and about 1970.

189. Betty Lee seeks such enhancement of her integration claim as are due a White nonhispanic female.

190. Orion's opponents have also challenged Betty Lee's integration proposal. They claim she doesn't have the experience and ability to effectuate it.

191. That attack is also rejected. Orion's opponents called Betty Lee for cross-examination, but then chose not to question her. Instead, they relied on some collateral testimony they obtained from Zeb Lee; namely, that WSKY did not include her in the category of "Officials and Managers" in the Annual Employment Reports they have filed with the Commission (Tr. 2351-2356).

192. However, that argument is a *non sequitur*. It doesn't follow that because Betty Lee wasn't listed as an official or manager at WSKY that she can't handle the position of Director of Public Affairs and Public Service at the *proposed* station (see Finding 185 *supra*.).

193. The record establishes that at WSKY some of Betty Lee's duties have been clearly clerical, but some are managerial. Some of her duties are in the sales category, some involve on-air work. She has scheduled interviews for station promotional efforts; she has interviewed guests on the air; and she handles correspondence and writes advertising copy. She has worked collections, sold advertising, managed WSKY's public affairs and public relations, and had charge of the station's promotions (Tr. 2347-2350).

194. But there is another important reason for rejecting the opponents' attack on Betty Lee's integration claim. Since Betty Lee was never called for cross-examination, the Presiding Officer never had a chance to observe her demeanor or ask her questions about her pledge. So he could not, in good conscience, sustain a collateral attack on her unrebutted, convincing, and credible direct testimony about her proposed integration. Betty Lee's 30% quantitative integration claim will be fully credited.

195. Finally, Orion intends to fully integrate Vice-President, Secretary, Director, and 30% stockholder *Brian Lee* into the proposed station's day-to-day operations. Mr. Lee will work full-time (at least 40 hours a week) as the station's Program Director. In that capacity he will develop and carry out the station's programming philosophy. He will plan and schedule station programming and supervise and coordinate the on-air staff.

196. Brian Lee, son of Zebulon and Betty Lee *supra.*, was born December 8, 1958 in Asheville, North Carolina. Except for his academic years (1977-1981), he has resided in Asheville (within the proposed station's service area) all his life. He will continue to reside in Asheville if Orion is granted.

197. Mr. Lee graduated from the Asheville school in 1977. He attended the University of North Carolina at Chapel Hill between 1977 and 1981. He graduated with a B.S. in Business Administration in the spring of 1981.

198. Brian Lee has about 13 years of broadcast experience. He worked at WXYC(FM), UNC's Chapel Hill station when he was at college, an also WSKY. He first worked at WSKY in 1976-1977 as an announcer, and then during the summers of 1978 and 1979 as full-time Music Director. Since 1981 he has been employed full-time at WSKY as Program Director or Music Director (Orion Ex. 3, para. 5-7).

199. Lee has local civic participation to his credit. He has been a member of the local Sierra Club (Wenoca Chapter) since 1982. He was elected to the Wenoca Chapter's Executive Committee in 1984 and served a two-year term. During 1984-1986, he participated in a program organized to serve Horse Pasture River, a scenic river in western Carolina. Since 1983, he has been a volunteer instructor in cardiopulmonary resuscitation (CPR). Since 1981 he has periodically assisted the director of the local County and City School Nature Program in educating children about appreciating and preserving nature and natural resources. During the summers since 1986 he has been a volunteer rock climbing instructor in the Asheville area.

200. Brian Lee is a White non-hispanic male.

201. *Harbinger Broadcasting Company*. Harbinger claims 100% quantitative integration. They intend to integrate all three of their General Partners into the proposed station's day-to-day operation.

202. First they intend to fully integrate a one-third General Partner *Terrell Metheny* into the proposed station's day-to-day operations. He will work full-time (at least 40 hours a week) as the Station Manager. In that capacity he will exercise overall supervision of the station's operations. This will include programming, news, and sales. He will leave his current employment in order to fulfill his integration proposal.

203. Terrell Metheny was born on August 22, 1934. At the time of the hearing he resided in Maumelle, Arkansas, but has apparently moved to Ohio since then. For a brief period between July, 1986 and August, 1987 he resided in Asheville. If Harbinger is granted, Metheny proposes to move to and reside in Biltmore Forest.[30]

204. Metheny is a career broadcaster. But a substantial amount of his broadcast experience is of a different sort than that ordinarily submitted in comparative proceedings. During much of his career Mr. Metheny have acted as a troubleshooter specializing in turnarounds. He reaches an agreement with the owner of a troubled station; i.e., either a failing station or one facing problems. Then he moves into the city of license, works at the station, and stays until the problems are solved. Sometimes Metheny is there three months, sometime six months, sometimes up to a year. Accordingly, his background appears nomadic, or like a traveling salesman's background.

205. Terrell Metheny has been in broadcasting in a variety of cities all over the country since 1953. In the late 1950's he was an air personality at Station WKDA(AM), Nashville, Tennessee, and in the early 1960's he was an air personality at Station WOKY(AM), Milwaukee, Wisconsin.

206. Between 1964 and 1969 Metheny was Program Director at WKLO(AM), Louisville, Kentucky and WMCA(AM), New York, New York. He worked as a Salesman, a Sales Manager, and General Manager for WORD(AM), Spartansburg, South Carolina, and WGGG(AM), Gainesville, Florida between September 1971 and January, 1972. Between September 1971 and January 1972 Metheny acted as a consultant for KYMO(AM)/(FM), Little Rock, Arkansas. Next he moved to KONO-AM and KITY-FM, San Antonio, Texas, and then returned to KYMO as a consultant in December, 1972.

207. In August, 1972, Metheny journeyed to KBEQ-FM, Kansas City, Missouri where he served as Sales Manager. In January 1974, he moved again, this time to WEAM, Arlington, Virginia, and worked a Program Director. In July, 1974 Metheny went to WGSO(AM), New Orleans as Program Director, and completed the circuit in December, 1974, by going back to KONO/KITY, San Antonio in a sales position.

208. Metheny moved again in the summer of 1975, this time to Houston, Texas and KXYZ(AM), where he worked in sales. He was promoted to Advertising/Promotion Manager in October, 1975. In March 1976, Metheny moved on to Beaumont, Texas and KJET(AM)/KWIC(FM) where he assumed the position of Vice-President General Manager. He held that position until October 1977. At that time he became President/General Manager of stations WRIT(AM)/WBCS(FM), Milwaukee. He stayed there until July, 1981.

209. From July, 1981 to November, 1984, Metheny was Executive Vice-President/General Manager of KUUY(AM)/KKAZ(FM), Cheyenne, Wyoming, and he held a 10% ownership interest in the licensee corporation, Mesa Broadcasting (Mesa). As part of his duties he also oversaw the operations of affiliated stations KOOK/AM and KBIT(FM) in Billings, Montana. A Mesa shareholder, Metheny was a party to Mesa's applications for Rock Springs and Billings (Tr. 2529, 2588-2589).

210. It was in late 1984, after a four-month stint as interim-general manager for KAAY(AM)/KLPQ(FM), Little Rock, Arkansas, he became Vice-President/General Manager at WYNK(AM)/(FM), Baton Rouge, Louisiana. Then, in July 1986, he became General Manager of station WWNC(AM), Asheville (see Finding 208 *supra.*). When WWNC was sold in August, 1987, Metheny became General Manager of station KHLT(AM)/(FM), Little Rock, Arkansas in October 1987.[31]

211. During his brief stay in Asheville (Finding 210 *supra*. 213 *infra*.), Mr. Metheny joined the Kiwanis Club (Tr. 2550). He worked on the Annual Pancake Breakfast (Harbinger Ex. 4, p. 1, Tr. 2559). Terrell Metheny is a White, non-hispanic male.

212. Next, Harbinger intends to fully integrate a one-third general partner *Carole A. Metheny* into the proposed station's day-to-day operation. Mrs. Metheny, wife of Terrell Metheny, would serve full-time (at least 40 hours a week) as sales manager. In the capacity she will hire and fire sales personnel, develop sales strategies and goals, and assume the responsibility for the sale staff's performance, for relations with sales representative firms, and for the traffic and billing personnel (Harbinger 3). Mrs. Metheny only agreed to be sales manager on the condition that she will not have to go out and sell advertising.

213. Carole Metheny was born on April 6, 1945. At the time of the hearing she resided with her husband in Maumelle, Arkansas, but may have moved to Ohio since then. *See* Finding 203 *supra*. For a brief period between July 1986 and August 1987, she resided in Asheville. If Harbinger is granted, and affordable housing can be secured, Mrs. Metheny intends to move to and reside in Biltmore Forest.

214. Mrs. Metheny hasn't been employed full-time since 1981. Unlike her husband who has had substantial broadcast experience, she has had very little. She has never held a management position in any broadcast station, and she has never sold advertising. Her only broadcast experience was when she worked as a bookkeeper at KUUY/KKAZ, Cheyenne, Wyoming, when her husband managed those stations (see Finding 209 *supra*.). She only took that position on an interim basis, to help out until the station could hire someone to replace the former bookkeeper. Since she married Terrell Metheny in September 1981, she considers herself "a radio widow."

215. During the brief period Mrs. Metheny resided in Asheville, she participated in her church's (The Grace Episcopal Church in Asheville) annual fund raising event. She sang in the church choir, and was active in the church's Mutual Care Committee; i.e., she visited invalids and patients at a retirement home. She was also a volunteer caseworker for Asheville-Buncombe County Christian Ministry, an ecumenical organization established to support needy members of the community. She also volunteered at the Asheville Community Theatre a few times.

216. Carole Metheny claims the integration enhancement afforded a White, non-hispanic female.

217. Finally, Harbinger intends to fully integrate its last one-third general partner, *Christine D. Longoria*, into the proposed station's day-to-day operations. Mrs. Longoria will work full-time (at least 40 hours a week) as programming manager. In that capacity she will hire and fire air staff personnel, formulate and carryout the station's programming format, and formulate and execute campaigns designed to enhance community awareness of the station's programming.

218. Christine Longoria was born on August 29, 1942, and currently resides in Asheville, North Carolina. She has resided there for the past 19 years (within Harbinger's predicted 70 DBU, 3.16 mV/m, contour). If Harbinger is granted she will remain a resident of Asheville.

219. Ms. Longoria has an undergraduate degree in Air, and a Master's degree in counseling. she isn't currently employed, and hasn't been for three years. She has no training or experience in broadcasting.

220. However, Ms. Longoria does have local civic participation. She is currently one of five members of the North Carolina Inmate Grievance Resolution Board, and is co-chair of its Budget Committee. For the past two years she has worked with the Asheville-Buncombe County Christian Ministry (see Finding 212 *supra*.). She is a member of the Vestry, Grace Episcopal Church of Asheville, a sustaining member of the Junior League, and a past chaplain of the Republican Women of Buncombe County. She is also currently a platelet and blood donor at the American Red Cross.

221. In 1970-71, Ms. Longoria was Vice-President of the Mental Health Association; in 1972, she was President of the Buncombe County Foster Children's Association, and Director of Volunteer Training for the local Red Cross Board of Volunteers; in 1974 she was a member of the Board of Directors of the Mental Health Center Advisory Board; from 1978-1980, she was a member of the Board of Directors of Asheville Community theater; in 1981, she served as Treasurer of the Altrusa Club, an Asheville women's organization that raises money for local charities; and in April, 1989, she worked on the Annual Community Arts Council Found Drive.

222. Christine D. Longoria claims such integration enhancements due an Hispanic female.

223. Some of Harbinger's opponents, in varying degrees, have attacked the quantitative claims of both Mrs. Metheny and Ms. Longoria. They claim that both commitments are questionable. They also question the permanence of Ms. Metheny's integration pledge. Some of the opponents even go so far as to question the permanence of Terrell Metheny's integration pledge on the grounds that he is too fiddle-footed to live up to this proposal. All of these attacks are rejected. They are argumentative, speculative, and factually lacking. Harbinger will receive the 100% quantitative integration they claim.

224. *Auxiliary Power*. All eight remaining applicants propose to install auxiliary power equipment that will keep the station on the air if the local power fails.

ULTIMATE FINDINGS OF FACT AND PRELIMINARY CONCLUSIONS OF LAW

1. Eight applicants[32] remain in the quest for Channel 243A in Biltmore Forest, North Carolina: (1) National Communications, Industries (NCI); (2) raKel Communications, Inc. (raKel); (3) Liberty Productions, a Limited Partnership; (4) Willsyr Communications Limited Partnership (Willsyr); (5) Biltmore Forest Broadcasting FM, Inc. (BFBFM); (6) Skyland Broadcasting Company (Skyland); (7) Orion Communications Limited (Orion); and (8) Harbinger Broadcasting Company (Harbinger).

2. The parties adduced evidence on five factual issues. *See* Finding 2 *supra*. Four of the five are basic qualifying issues; i.e., one against BFBFM; one against raKel; and two against Liberty. The fifth issue is the standard comparative issue.

THE BASIC QUALIFYING ISSUES

3. Before we turn to the standard comparative issue, we must first consider our four basic qualifying issues. For it is axiomatic that only basic qualified applicants are entitled to a comparative analysis. *See e.g. Louis Adelman*, 29 FCC 1223, 18 RR 1062 (1960) *affirmed sub. nom. Guinan v. Federal Communications Commission*, 297 F. 2d 782, 22 RR 2026 (1961).

4. *BFBFM - 1.* Under BFBFM-1 we must determine whether BFBFM has a reasonable assurance that the transmitter specified will be available to it. BFBFM has failed to meet that issue. BFBFM does not now, and since October 9, 1987 has not had an available transmitter site. Moreover, they were fully aware, at least six months before the case was designated for hearing, that they had lost their site. But they never reported it, and more importantly they made no timely effort to obtain a new site. *See* Findings 9-15 *supra*. Since BFBFM has no transmitter site they have failed to sustain their burden of proof under BFBFM-1 and they aren't basically qualified to become a Commission licensee. So their application will be denied, and they will receive no further consideration.[33]

5. *raKel - 1.* The Chief, Audio Services Division properly carried over a misrepresentation issue against raKel over from another proceeding, the Upper Arlington proceeding (see Finding 2, and Footnote 8 *supra*.). So we must determine whether raKel falsely certified that their transmitter site was available in the Upper Arlington proceeding, and if so, what impact that has on raKel's character qualifications.

6. raKel has carried its burden under this issue. The weight of the evidence demonstrates that raKel's Michael Klepper had obtained the required reasonable assurance that their Upper Arlington transmitter site was available when they filed their Upper Arlington application. So raKel did not misrepresent in BPH-860507PE, they remain basically qualified to be a Commission licensee, and they are entitled to comparative consideration.[34] *See* Findings 16-35 *supra*.

7. *Liberty - 1.* Under Liberty-1 we must determine whether Liberty's proposed transmitter is available to them. Liberty has failed to meet that issue. The record shows that Liberty has never had, and does not now have available the transmitter site they propose in their application. *See* Findings 36-39 *supra*. Since they don't have their specified transmitter site, they've failed to meet their burden of proof under Liberty-1 and they're not basically qualified to be a Commission licensee.

8. *Liberty 1.* Under Liberty-2 we must determine whether Liberty has made misrepresentations to the Commission about the availability of their proposed site's availability. Again Liberty has failed to meet its burden under issue. The record clearly justifies the conclusion that when Valerie Klemmer represented to the Commission that Liberty had available the transmitter site specified in their application, she had absolutely no basis for doing so. Moreover, she knew she had no basis for so certifying. To argue that her feeble, half-hearted effort to obtain some of Vicki Utter's land on Busbee Mountain constitutes "reasonable assurance" strains credulity. No, Valerie Klemmer has blatantly dissembled in a manner that doesn't befit a prospective broadcast permittee. *See* Findings 40-51 *supra*. Stated simply, Liberty has shown that it doesn't possess the necessary character qualifications to be a Commission licensee, and its application must be denied.

9. Since Liberty has been disqualified under either Liberty-1 or Liberty-2, their application will be denied, and they will receive no further consideration.[35]

THE STANDARD COMPARATIVE ISSUE

10. With the elimination of BFBFM and Liberty, six applicants remain for comparative consideration: (1) NCI; (2) raKel; (3) Willsyr; (4) Skyland; (5) Orion; and (6) Harbinger. These six will be analyzed under the criteria set out in the Commission's *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, as modified by subsequent Review Board and Commission decisions.

11. We will direct our analysis toward the Commission's two primary comparative objectives: (1) selecting the applicant that will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant that will offer the best practicable service to the public.

12. *Diversification of Mass Media.* Turning to the Commission's first primary objective, we see that four of our six applicants offer the maximum diffusion of control of mass media communications. NCI, Skyland, Orion, and Harbinger are clean from a diversification stand point; i.e., they have no attributable mass media holdings. So they are entitled to diversification preferences over the other two, raKel and Willsyr.

13. Both raKel and Willsyr have been assigned *substantial diversification demerits*. raKel's demerit stems principally from the Klepper family's holdings and broadcast positions, although some of raKel's other directors also have interests attributable. Willsyr's demerit stems from William's Marilyn's and Lee Eaton's ownership interests and management positions in WCRS(AM) and WCRS(FM), Greenwood, South Carolina. The assignment of these demerits to raKel and Willsyr under the Commission's first primary objective all but eliminates them from the comparative contest. *See* Findings 63-88 *supra*. However, they will be considered further under the Commission's second objective; i.e., the best practicable service objective.

14. *The Best Practicable Service.* In deciding which of the six will offer the best practicable service, we may have to consider up to four Commission criterion: (1) whether any applicant or applicants should be preferred because of a superior areas and populations proposal (comparative coverage); (2) the degree each will integrate their ownership into the day-to-day management of the proposed station (quantitative integration); (3) the qualities each integrated owner will bring to that day-to-day management (qualitative integration); and (4) whether the degree of quantitative and qualitative integration each will bring is enhanced by minority and/or female ownership. Criterion 3 (qualitative integration *supra*.) includes such factors as local residence, participation in civic affairs within the proposed service area; past education and business experience, past broadcast experience, and auxiliary power.

15. *Criterion 1*: *Comparative Coverage* : No decisional or even substantial preference will be awarded under this criterion. Harbinger merits a *very slight preference* over

the other five applicants. In turn NCI, Willsyr, Skyland, and Orion have earned a *very slight preference* over raKel. *See* Findings 91-94 *supra*. This means that unless two or more of these applicants finish in a dead heat on the other comparative criterion, comparative coverage will play no role in the out come of this decision.

16. *Criterion 2*: *Quantitative Integration*. The following chart shows how much quantitative integration each applicant claims, how much they've been awarded, and findings of fact upon which that award is based.

CHART

Name of Applicant	Integration Claimed	Integration Awarded	Findings of Fact Supporting Award
NCI	97%	50%	97-105 *supra*.
raKel	70.47%	0%	109-112 *supra*.
Willsyr	100%	0%	120-143 *supra*.
Skyland	100%	76%	152-171 *supra*.
Orion	100%	100%	172-200 *supra*.
Harbinger	100%	100%	201-223 *supra*.

17. An evaluation of that chart, the findings underlying that chart, and our preliminary diversification conclusions 12-13 *supra*. permits some further conclusions. First of all *raKel* and *Willsyr* are eliminated from any further consideration. Their substantial diversification demerits along with their 0% quantitative integration award leaves them in a hopeless position comparatively. They are eliminated.

18. *NCI* and *Skyland* don't fair much better. Their 50% and 76% quantitative credits are woefully inadequate vis-a-vis Orion's and Harbinger's 100% awards. So we needn't evaluate NCI and Skyland under Criteria 3 and 4; i.e., qualitative integration, and female and/or minority enhancement. *See New Continental Broadcasting Co*., 88 FCC 2d 830, 50 RR 2d 1117 (1981); *Van Buren Community Service*, 87 FCC 2d 1018, 50 RR 2d 15 (1981); and *Cannon Point Broadcasting Co*., 93 FCC 2d 643 (R. Bd. 1983) at 649.[36]

19. *Criterion 3*: *Qualitative Integration* : So we are down to Orion and Harbinger. Both have made their 100% quantitative integration claims stand up and both are clean from a diversification standpoint.

20. Turning first to *local residence*, we see that Orion is entitled to a *substantial* preference over Harbinger. All three of Orion's integrated principals (100%) are long-time local residents. Only one of Harbinger's three principals can be realistically classified as a local resident; i.e., Christine Longoria with her 19 years of residency. Compare Findings 174, 185 and 196 with 218 *supra*.Terrell's and Carole Metheny's past brief sojourn in Asheville during their nomadic existence is entitled to no significant weight. So it boils down to Orion's 100% long-time residency versus Harbinger's one-third local residency and two promises to move to the area if they're granted. Orion is clearly and substantially preferred under local residency.

21. Similarly, and as one might expect, Orion earns a *substantial* preference over Harbinger for *participation in civic affairs* within the proposed service area. (compare Findings 178-179, 188, and 199 with 220-221 *supra*.). All three of Orion's principals (Zebulon Lee, Betty Lee, and Brian Lee) have been civically active in the Asheville area; and although Christine Longoria's past civic record is commendable, Terrell and Carole Metheny's civic participation in civic activities during their brief sojourn in Asheville is entitled to no significant weight.

22. It is under the factor of *broadcast experience* that Orion almost burys Harbinger comparatively. Harbinger's Terrell Metheny's 36 years of broadcast experience is grass roots experience. *See* Findings 209-215 *supra*. And under ordinary circumstances Mr. Metheny's long-time experience would garner Harbinger a comparative preference over most competing applicants. But these are not ordinary circumstances, because Orion's anchor man, Zebulon Lee has 50 years of broadcast experience - 42 of them as an AM station owner. *See* Findings 181-183. At 78 years of age, Zeb Lee not only is the full-time General Manager of his AM facility, he writes, produces, and announces a 20-minute daily sports commentary and does the play-by-play for about 30 local ball games per year. So Zebulon Lee is entitled to a slight preference over harbinger's Terrell Metheny.

23. It's at this point that Harbinger's past broadcast position starts to unravel. Orion's Betty Lee has about thirteen years of past broadcast experience. While little of that experience could be classified as management experience, she has been active full-time since 1977. She has been a copy writer, worked in production, and production management, and been in the management of public service programming and affairs. *See* Findings 191-192 *supra*.

24. Harbinger's counterpart, Carole Metheny, has had almost no broadcast experience. in fact, she has not been employed full-time in any occupation since 1981. *See* Finding 219 *supra*.

25. Orion's third integrated principal, Brian Lee, has about 13 years of broadcast experience. He has been an Announcer, a Music Director, and a Program Director. *See* Finding 203 *supra* On the other hand Harbinger's counterpart, Christine Longoria has no broadcast training or experience. In fact, Ms. Longoria is not currently employed in any occupation, and hasn't been for the last three years. *See* Finding 224 *supra*.

26. Both Orion and Harbinger propose to install auxiliary power equipment. *See* Finding 229 *supra*. So that factor has no role in our best practicable service evaluation.

27. Finally, we turn to our fourth criterion: i.e., whether the degree of quantitative and qualitative integration that Orion and Harbinger will bring is enhanced by minority and/or female ownership. Here Harbinger is to be preferred. Their 100% quantitative integration is enchanced with 33% minority participation (Christine Longoria) and 67% female participation (Christine Longoria and Carole Metheny). Orion's 100% quantitative integration is enhanced only by 30% female participation (Betty Lee).

THE ULTIMATE ISSUE

28. Under the ultimate issue (Finding 2 *supra*.) we must determine which of the applications if any should be granted. Only two of the final six mutually-exclusive applicants have made their 100% quantitative integration claim stand up: Orion and Harbinger.

29. As between Orion and Harbinger, Orion is clearly the applicant who will offer the best practicable service to the public. The qualitative enhancements spell the dif-

ference. Minority participation and local residence are of equal importance. *See Radio Jonesboro, Inc.*, 100 F. 2d 941, 945-946 (1985). Orion's 100% credit for long term residence clearly prevails over Harbinger's 33% for local residence and 33% for minority participation (total-66%). Nor is that advantage offset by Harbinger's 67% to 30% advantage on female participation since female participation is of less importance than minority participation or local residence. *See Mid - Florida Television Corporation*, 69 FCC 2d 607, 652 (Rev. Bd. 1987); *Radio Jonesboro, Inc., supra.*

30. Then we must add in Orion's 100% to 33% advantage on civic participation, and its powerful and substantial 100% to 33% advantage on past broadcast experience. Harbinger's very slight preference over Orion for comparative coverage does little to offset Orion's large comparative integration advantage. Orion is declared the winner.

SO, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, Orion Communications Limited's application (BPH-870901ME) IS GRANTED subject to the following condition:

> "Before Orion begins operation on Channel 243A in Biltmore Forest, North Carolina, Radio Asheville, Inc. (Zebulon C. Lee) will completely dispose of their interest in WSKY(AM), Asheville, North Carolina;"[37] and

The applications of National Communications Industries (BPH-870831MF); raKel Communications, Inc. (BPH-870831ME); Liberty Productions, Limited Partnership (BPH-870831MI); Willsyr Communications Limited Partnership (BPH-870831MJ); Biltmore Forest Broadcasting FM, Inc. (BPH-870831MN); Skyland Broadcasting Company (BPH-870831ML); and Harbinger Broadcasting Company (BPH-870831MF) ARE DENIED.[38]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Adminstrative Law Judge

FOOTNOTES

[1] The issues have been reorganized so that the basic qualifying issues are set out first, followed by the standard comparative issue, and then the ultimate issue.

[2] United's so-called Findings didn't comply with the Commission's rules because the two principals representing United *pro se* didn't try to. The United problem will be dealt with in a preliminary ruling *infra*.

[3] The parties were ordered to notify the Presiding Officer and all of their opponents if they opted not to file replies. *See* FCC 89M-1919 released July 21, 1989. BFBFM did so notify, United didn't. *See* Footnote 2 *supra*.

[4] The Mass Media Bureau describes this ruling as " . . . unduly harsh." *See* Mass Media Bureau's Proposed Findings of Fact and Conclusions of Law filed October 23, 1989. Is the Bureau suggesting that the Trier of Fact show favoritism to a *pro se* applicant who doesn't have enough respect for the Commission or its processes to learn even the most rudimentiary procedures? Let's hope not.

[5] Had they done so they would have surely discovered what Rebecca Wabish had done.

[6] Strangley enough, and although they had known since mid-1988 that they didn't have a transmitter site, BFBFM did file a post-designation amendment on a non-engineering matter; i.e., an ownership structure change, on February 7, 1989. That amendment was accepted. *See* FCC 89M-673, released March 1, 1989.

[7] Indeed, and since the November 20, 1987 amendment had turned out to be abjectly false, we would have had to add, *inter alia*, a misrepresenation issue against BFBFM.

[8] The Upper Arlington proceeding settled out without this issue being resolved. So it was transferred to this proceeding. *See* 54 F.R. 3847 *supra*. at para. 7-8, and Issues 2-3 as modified by FCC 89M-866 released March 20, 1989.

[9] So we have still another applicant who on the day before the application was filed (see Finding 17 *supra*.) hadn't buttoned down a transmitter site. Probably eighty percent of the Commission's transmitter site hearing problems are the result of their last-minute stabs at obtaining a "reasonable assurance" that a transmitter site is available. Stated another way, if Michael Klepper couldn't receive a reasonable assurance from Ohio Equities he probably wouldn't have time to shop around for another firm.

[10] But see *infra*.

[11] Apparently at the Los Angeles meeting Klepper and his counsel tried to refresh Mr. Starts memory by referring to certain specifics that occurred (or at least Mr. Klepper claimed occurred) at the April 29, 1986 meeting (Findings 20-26 *supra*.). Those specifics evidently didn't jog Starts' memory, and he wasn't going to have them attributed to him. Hence the references to what Michael Klepper recalls.

[12] The Presiding Officer observed Michael Klepper's demeanor during his testimony (Tr. 388-463). He was sincere and straightforward; he answered the questions directly, and made no attempts to hedge. All in all he was an honest witness and a good one.

[13] The availability of contemporaneous plats, maps, and a real estate listing lends much credence to Michael Klepper's version of what happened. So while we don't have a written lease or deed of sale, we do have contemporaneous documents to support raKel's claim that it had a reasonable assurance its transmitter site was available.

[14] Liberty's belated attempt to change transmitter sites was denied. *See* FCC 89M-1080, released April 5, 1989.

[15] Tim Warner is the General Manager of WCQS(FM), Asheville - a noncommercial educational station. WCQS' tower is located on property adjacent to Ms. Utter's property on Busbee Mountain (Liberty Ex. 4, pp. 1-2).

[16] Orion filed its petition to enlarge issues against Liberty on February 27, 1989.

[17] *Progressive Communications, Inc.*, 3 FCC Rcd 5758, 5759 (Rev.Bd. 1988); *South Florida Broadcasting Co. Inc.*, 99 FCC 2d 840 (Rev.Bd. 1984).

[18] However, full comparative findings will be made on all eight remaining applicants. It will only be comparative conclusions that aren't needed. So if an appellate body disagrees with the disqualification of either Liberty or BFBFM or both, no remand will be required. Stated another way, Findings of Fact will be made on *all* issues, and Conclusions of Law will be made on *all material* issues. *See WFPG, Inc.*, 33 FCC 673 (1962) at

para. 13; *Alkima Broadcasting Co.*, 30 FCC 932, at Fn. 2; *Sayger Broadcasting Co.*, 32 FCC 496 at Fn. 7; 47 CFR 1.267(b); and 5 USC 557(c)(A).

[19] But see Footnote 18 *supra*.

[20] As the evidence will show *infra.*, an excellent argument can be made that Ms. Hunter's alleged general managership is a sham, and that NCI is entitled to 0% quantitative integration. However, the Presiding Officer has adopted the more charitable approach.

[21] Nevada is a community property state.

[22] William Hunter's bit of candid testimony pinpoints the problem. In an effort to prevail in a comparative hearing, many White, non hispanic, male applicants seek out a general partner who has the right gender and/or race credentials as a front for their limited partnership. But all too often that general partner isn't capable of managing the proposed station or controlling the partnership. So actual control remains with experienced limited partner who usually holds the majority of the partnership's equity.

[23] Does her operational adviser, William Hunter, also intend to move to Biltmore Forest (Findings 104-105 *supra.*)?

[24] The word "ostensibly" has been used because Sharan Harrison has never paid for her 20% equity interest.

[25] Sharan Harrison resides at 821 Hound Street, Greenwood, South Carolina. She has lived at this address with her parents for the past 28 years, and she has lived in Greenwood all her life (Tr. 1074-1075, 1086).

[26] Ms. Harrison admits that the position she intends to fill is a big responsibility, far beyond anything she has ever handled (Tr. 1091).

[27] One of the 8% non-voting stockholders, Wayne Alexander, has died. His widow, Viola T. Alexander, as administratix of the estate presently controls those shares. *See* Skyland's Petition for Leave to Amend filed March 19, 1990.

[28] An argument can be made that C. J. McGuire and Phil Henderson who jointly own a non-voting equity of 8% (see Finding 60 *supra.)* are not sufficiently insulated from Skylands operations as to be considered passive investors (Willsyr Exs. 11, 12; Tr. 1882, 1890-1894, 19100 1912, 1954-1961, 1981-1983, 1988-1990, and 2251-2252). However, the arms-length nature of the letter agreement between McGuire and Henderson on the one hand and mid-south on the other hand satisfies the Presiding Officer that they are sufficiently passive. Any doubts about McGuire's and Henderson's passiveness will be resolved in Shyland's favor.

[29] See Finding 79 *supra*.

[30] Whether Metheny will reside in Biltmore Forest itself or somewhere else within the proposed station's primary service contour will depend on whether there is affordable housing in Biltmore Forest or not (Harbinger Ex. 4, p. 1; Tr. 2554).

[31] The record doesn't disclose how successful Terrell Metheny was as a troubleshooter. All that we really know is that he made the moves described.

[32] United Broadcasting Enterprises has been dismissed for failure to prosecute. *See* Findings 5-8 *supra*.

[33] But see Footnote 18 *supra*. and Findings 58, 71-76, 87, 91-94, 95, 144-137, and 221 *supra*. Note that even if BFBFM were basically qualified, theywould receive a decisionally significant diversification demerit (Finding 87 *supra.*), and even if that were not so, they couldn't possible prevail under the standard comparative issue. They're only claiming 15% quantitative integration. It's applicants like this, that really don't belong in the case,that place an undue burden on the Commission's resources. Witness the time and effort spent on preparing and making the findings cited in this Footnote.

[34] As will be noted *infra*. raKel fares badly under the standard comparative issue. But since raKel's principals are existing licensees, and since the Klepper family may want to file for broadcast facilities in the future, it is important that a clear determination be made under the carry-over.

[35] But see Footnote 18 *supra*. and Findings 56, 68, 85, 113-119, and 224 *supra*.

[36] Note however that comparative findings were made on all four best practicable service criterion. It's only further comparative conclusions that aren't required.

[37] *See* Findings 79-82, 186-187, 192-193, 198 and Conclusions 12-13, and 22-25 *supra*.

[38] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, the Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-305

In the Matter of

General Telephone Operating Companies Revisions to Tariff F.C.C. No. 1 — Transmittal Nos. 572 and 587

ORDER

Adopted: April 27, 1990; Released: May 3, 1990

By the Chief, Common Carrier Bureau:

1. On February 13, 1990, GTE Telephone Operating Companies (GTOC) filed Transmittal No. 572, which would establish general tariffed rates for DS3 special access and DS3 multiplexing services in the state of West Virginia. On February 28, 1990, MCI Telecommunications Corporation (MCI) filed a petition to suspend and investigate Transmittal 572 (MCI Petition), to which GTOC replied on March 12, 1990 (GTOC Reply). GTOC Transmittal 572 is currently scheduled to become effective on May 14, 1990.

2. GTOC's proposed general DS3 rates include two rate elements. The first rate element, DS3 Special Access Lines (SALs), provides facilities between a customer's designated location and the GTOC serving wire center for that location. GTOC offers two types of SALs: one for interexchange carriers (ICs), which terminate at an IC's point of presence, and end user SALs, which terminate at all other locations. Each one of these subelements is further divided into two components, namely, "Where Facilities Exist" and "Where Facilities Do Not Exist." If the SAL exceeds 1/4 airline mile, a customer subscribing to service where GTOC already has facilities would pay a lower rate than a customer located where GTOC facilities "do not exist," but which is the same distance from GTOC's serving wire center. The higher SAL rate where facilities do not exist contemplates special construction of facilities necessary for GTOC to provide customer service.[1]

3. MCI Telecommunications Corporation (MCI) argues that the general DS3 rates in Transmittal 572 are unreasonably high for customers who do not have existing DS3 facilities and are located more than three miles from GTOC's West Virginia serving wire center (SWC). MCI Petition at 1. MCI contends that it would be cheaper for an IC located 13 miles from GTOC's SWC to contract for five DS1 facilities for a one-year period than to replace the five DS1 facilities with a DS3 channel that would fill the remainder of its capacity with switched traffic. *Id.* Therefore, MCI asserts, it is not cost-efficient for ICs with limited special access traffic, located more than three miles from GTOC's SWC, to order DS3 service or to build a point of presence in proximity to GTOC's SWC to offset mileage charges. *Id. at 2.*

4. In reply, GTOC argues that it did not develop its DS3 rates in relation to its DS1 rates, and that any such DS3 ratemaking method would constitute strategic pricing. GTOC Reply at 2. GTOC contends that MCI's comparison of DS1 to DS3 rates on a 28 to 1 basis is faulty because that comparison fails to consider the different costs and elements inherent in DS1 configurations vis-a-vis DS3 configurations. *Id.*

5. On March 16, 1990, GTOC filed Transmittal No. 587, also scheduled to become effective May 14, 1990, to eliminate separate rates for the "Where Facilities Do Not Exist" component. GTOC will instead apply the current additional "Where Facilities Exist" rate element as a generic distance charge. GTOC states in its Description and Justification (D&J) that minimal requests for the "Where Facilities Do Not Exist" component, coupled with confusion over which rate element applies to which customers, justifies this revision. According to GTOC, any requests for facilities which require exceptional construction costs will be assessed charges under its special construction tariff. The level of additional costs averaged into the "Where Facilities Exist" rate element will have negligible effects, contends GTOC, because of limited demand. GTOC Tr. 587 D&J at 1-2. No petitions were filed against Transmittal 587.

6. On June 28, 1989, this Bureau released an Order initiating Docket 89-305, an investigation of various GTOC general DS3 offerings.[2] Issues raised in that investigation generally include whether certain DS3 rates and rate structures are unreasonably discriminatory or provide an undue preference in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a). We have concluded that GTOC Transmittal 572 raises the same issues as the transmittals under investigation in Docket 89-305. Those transmittals were suspended for one day and became effective subject to an investigation and accounting order. Because of the close similarity between Transmittal 572 and the transmittals already under investigation, we have determined that Transmittal 572 should be subject to the outcome of that investigation. We also conclude that Transmittal 572 should be subject to an accounting order. For purposes of imposing an accounting order, we are suspending Transmittal 572 for one day.

7. Accordingly, IT IS ORDERED that GTE Operating Companies Tariff F.C.C. No. 1, Transmittal No. 572 IS INCORPORATED into the Commission's on-going investigation in CC Docket No. 89-305.

8. IT IS FURTHER ORDERED that the petition to suspend and investigate GTE Telephone Operating Companies Tariff F.C.C. No. 1, Transmittal No. 572, filed by MCI Telecommunications Corporation is GRANTED IN PART and otherwise IS DENIED.

9. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the subject tariff revisions are suspended for one day.

10. IT IS FURTHER ORDERED that GTE Telephone Operating Companies shall file a supplement reflecting the suspension of its DS3 rates for one day no later than five days from the release date of this Order. For this purpose Special Permission No. 90-434 is assigned.

11. IT IS FURTHER ORDERED that, pursuant to Sections 4(i) and 204(a) of the Communications Act, 47 U.S.C. §§ 154(i), 204(a), and Section 0.291 of the Com-

mission's Rules, 47 C.F.R. § 0.291, GTE Telephone Operating Companies shall keep accurate account of all amounts received pursuant to rates which are the subject of the CC Docket No. 89-305 investigation.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] The second DS3 rate element is Special Transport, which consists of charges for each termination of a special transport facility and an additional charge based on the airline mileage between terminating locations. In addition, rates for DS3 service vary depending upon whether the customer selects GTOC's one-, three-, five-, or seven-year DS3 service commitment option.

[2] *See* GTE Telephone Operating Companies, Revisions to Tariff F.C.C. No. 1, CC Docket No. 89-305, Memorandum Opinion and Order, 4 FCC Rcd 5425 (Com.Car.Bur. 1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-1
Phase II

In the Matter of

Annual 1988 Access
Tariff Filings

GTE Operating Companies

ORDER

Adopted: April 27, 1990; Released: April 30, 1990

By the Chief, Common Carrier Bureau:

1. On March 28, 1990, the Commission issued an Order[1] directing the GTE Operating Companies (GTOCs) to make refunds totalling approximately $1.01 million to interstate customers on the basis of each customer's share of 1988 local transport payments. The refunds were to be made within 30 days of the release of the Order, *i.e.*, April 28, 1990. On April 20, 1990, the GTOCs filed a motion to delay payment of the refunds (GTOC Motion). The GTOCs ask the Commission to exercise its equitable discretion under the Communications Act to delay payment of the refunds until the Commission and United States Court of Appeals for the District of Columbia Circuit have completed their final review of the Commission's Orders issued in this proceeding on December 27, 1988, and April 27, 1989,[2] and until the Commission rules on the petition for reconsideration of the *March 28 Order* the GTOCs plan to file within the statutory time period.

2. The refunds were ordered because, in the *December 27 Order*, the Commission concluded that the GTOCs had applied an incorrect interpretation of our jurisdictional separations rules in computing circuit equipment revenue requirements with respect to Central Office Equipment (COE) Category 4.23 investment. Specifically, the GTOCs allocated COE 4.23 investment to subcategories on the basis of end terminations, whereas the applicable separations rule required an allocation based on total terminations, including intermediate terminations. [3] The result of this allocation error was that the GTOCs developed certain special access and local transport revenue requirements incorrectly. Since the record at the time of the *December 27 Order* was not sufficiently detailed to enable precise calculation of the effect of the GTOC errors, the Commission ordered the GTOCs to submit certain additional data, which they did on January 6, 1989. The Commission used the additional data to determine the effect of the GTOCs' miscalculations for all GTOC Tier 1 study areas, and ordered the refunds.

3. The GTOCs argue that delaying payment of the refunds is justified until final review is complete. They contend that in their petition for reconsideration they will ask the Commission to reconsider the disallowances imposed by the *March 28 Order*. GTOC Motion at 3. Specifically, the GTOCs say they will charge that there was insufficient record evidence to find that the GTOCs' methodology necessarily caused unreasonable rates; that since the method was not unreasonable, the disallowances were not justified; that the adjustment for purported revenue requirement over-recoveries did not consider the countervailing revenue requirement under-recoveries; and that even if the disallowances are upheld, the refund calculation is inconsistent with the policy monitoring and enforcing the rate of return prescription. *Id.*

4. The GTOCs further claim that the refunds were ordered without a valid accounting order, an issue currently pending review by the Court of Appeals. *Id.* They also claim they will suffer irreparable injury if they are required to commence payment before their appeals have been exhausted since the Commission does not have a mechanism for the recovery of refunds once they have been issued. *Id.* at 4. The GTOCs also argue that simply preparing the refunds would involve significant resources which would otherwise not be expended if they are upheld on appeal. *Id.* at 4-5. In contrast, the GTOCs claim, interested parties will not be harmed from any delay in the refund issuance because they will ultimately receive the refunds, plus interest, if the GTOCs do not prevail on appeal. *Id.* at 5. The GTOCs thus argue that the public interest would be served by maintaining the status quo. *Id.* Finally the GTOCs note that, given the pendency of their appeal, the Common Carrier Bureau previously exercised the Commission's equitable discretion in granting the GTOCs an extension of time for which to refund the $7.34 million ordered in the *Reconsideration Order*, requiring the GTOCs instead to place the refund amount in an interest bearing escrow account. *Id.* at 2. They say they will place the refund amount of approximately $1.01 million in the same interest bearing account. *Id.* at 6.

5. We have reviewed the GTOCs' motion and conclude that it is in the public interest to delay the effective date of the refunds the GTOCs are required to make while this matter is under review. Our decision to grant the GTOCs an extension of time, however, in no way affects any of the conclusions the Commission reached in the *Reconsideration Order*. In granting this extension we are merely relying on the equitable discretion given the Commission under Section 705 of the Administrative Procedure Act, 5 U.S.C. § 705, and Section 4(j) of the Communications Act, 47 U.S.C. § 154(j). In order to ensure the GTOCs will be in a position to refund the overcharges if so required, we instruct the GTOCs to place the $1.01 million, plus interest accrued as stipulated in paragraph 5, *infra*, in the interest bearing escrow account established in our September 29, 1989 Order[4] until May 14, 1991. The GTOCs must provide the Commission with written documentation by May 14, 1990, demonstrating that they have deposited these funds in the interest bearing escrow account. If the GTOCs fail to place these funds in escrow by that date, they must commence payment of the $1.01 million, plus accrued interest, by May 14, 1990.

6. Accordingly, IT IS ORDERED pursuant to Section 4(j) of the Communications Act of 1934, 47 U.S.C. § 154(j), that the GTE Telephone Operating Companies are granted an extension of time until May 14, 1990, to make refunds of the $1.01 million in overcharges as required by the *March 28 Order*. Grant of this extension is contingent

upon the GTE Telephone Operating Companies depositing $1.01 million, plus interest already accrued, in the interest bearing escrow account established in our *September 1989 Order* on or before May 14, 1990, and providing the Commission with written confirmation that such funds have been placed in said account. The simple interest accruing from March 28, 1990, to the date of deposit in escrow, using the current Internal Revenue Service rate, shall be added to the $1.01 million stated above. The same Internal Revenue Service rate shall then be used to compute simple interest from the date of deposit in escrow to the date the refunds are finally paid. The cost of administering this account shall be borne by the GTE Operating Companies.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, 5 FCC Rcd 2150 (1990) (*March 28 Order*).

[2] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, 4 FCC Rcd 4115 (1988) (*December 27 Order*), *recon.*, 4 FCC Rcd 3965 (1989) (*Reconsideration Order*), *further recon.*, 4 FCC Rcd 7906 (1989) *appeal pending*, Southern Bell Telephone & Telegraph Co. v. FCC, No. 88-1081 (D.C. Cir. filed Feb. 2, 1989).

[3] *See* Section 36.126 of the *Separations Manual*, 47 C.F.R. § 36.126.

[4] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, 4 FCC Rcd 7594 (1989) (*September 29 Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

TELETECH, INC. File No. LPD-99

Petition to Decertify IAFC, IMSA and SEFCC as Frequency Coordinators in the Fire and Special Emergency Radio Services

ORDER

Adopted: April 27, 1990; Released: May 4, 1990

By the Commission:

1. On August 28, 1989, the Chief of the Private Radio Bureau (Bureau), acting pursuant to delegated authority, denied a Petition for Decertification of the International Association of Fire Chiefs, Inc. (IAFC), the International Municipal Signal Association (IMSA), and the Special Emergency Frequency Coordinating Committee (SEFCC) as Frequency Coordinators in the Fire and Special Emergency Radio Services. This petition was filed by Teletech, Inc. The Commission has before it for consideration Teletech's October 10, 1989, Application for Review of the Bureau's action.

2. Teletech filed the instant application, with a Motion to Accept Late Filed Pleading, beyond the 30 day period of time provided by Section 1.115(d) of the Commission's Rules, 47 C.F.R. § 1.115(d). Teletech states that it received the Bureau's letter late and that newly retained counsel lacked sufficient time to prepare Teletech's response in accordance with Section 1.115(d). Teletech, however, did not request an extension until after the 30 day period of time had expired. Teletech, moreover, has provided insufficient grounds to waive Section 1.115(d), and, therefore, we are dismissing the instant application as procedurally defective.

3. The Application for Review, furthermore, essentially restates arguments made in Teletech's original petition, which were thoroughly addressed in the Bureau's letter.[1] We have reviewed substantively the Bureau's action denying that request and find no error. Thus, if we were to reach the merits, we would deny the application for review.

4. Accordingly, IT IS ORDERED that pursuant to Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Application for Review IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

August 28, 1989

7320-09
LPD-99

Ms. Susan Dobronski
Teletech, Inc.
P.O. Box 4221
Scottsdale, Arizona 85261

Dear Ms. Dobronski:

This refers to the February 27, 1989, *Petition* by Teletech, Inc., for Decertification of the International Association of Fire Chiefs, Inc. (IAFC), the International Municipal Signal Association (IMSA), and the Special Emergency Frequency Coordinating Committee (SEFCC) as Frequency Coordinators in the Fire and Special Emergency Radio Services.[2] We have reviewed Teletech's allegations and concluded they lack merit. Accordingly, we will deny the petition.

By way of background, the Commission, in its *Report and Order* (Order) in PR Docket No. 83-737, 103 FCC 2d 1093 (1986), certified 19 organizations as frequency coordinators of 25 private radio services. IMSA and IAFC were jointly certified as the coordinator of the Fire Radio Service. *See Order* at paras. 74-75. IMSA, IAFC and NABER were jointly certified as the coordinator of the Special Emergency Radio Service. *See Order* at para. 77. The collective organization formed by these three organizations is the Special Emergency Frequency Coordinating Committee.

Your petition argues that IMSA/IAFC must be disqualified as a Commission certified frequency coordinator because of an alleged unauthorized transfer of control of authority and abdication of responsibilities. In support of this assertion you refer to information reported to the Commission by IMSA/IAFC in its November 17, 1987, response to the Commission's October 13, 1987, request for information.

IMSA/IAFC stated in November 1987 that it had determined that its frequency coordination obligations could be best met through the services of a contractor, FreCoor, Inc. It stated that each organization is multi-faceted, with interests in many areas of public safety throughout the United States, so that it would be desirable to keep frequency coordination as a separate entity. IMSA/IAFC stated that it recognized that frequency coordination still remained its responsibility and that its contract with FreCoor is a vehicle to assure that this end is met. Attached to IMSA/IAFC's response was a copy of the June 30, 1986, Agreement between IMSA, IAFC and FreCoor.

You state that it is clear from the terms of this Agreement that IMSA/IAFC has impermissibly turned over, *in toto*, its responsibilities as frequency coordinators in the Fire and Special Emergency Radio Services. You refer to provisions in the Agreement whereby IMSA/IAFC has delegated to FreCoor broad authority and responsibility regarding IMSA/IAFC's Commission certified activities. This delegation includes application review and processing, coordinating frequencies, forwarding applications, and interfacing with the Commission and other certified coordinators. You quote several provisions of the Agree-

ment as evidence that FreCoor has been granted impermissible authority to perform IMSA/IAFC's Commission certified coordination functions, particularly a phrase stating that "IAFC/IMSA will *not in any way* interfere with FreCoor's activities."

We reviewed IMSA/IAFC's contractual relationship with FreCoor as part of the 1987-88 coordinator audit. We asked follow-up questions in September 1988 and, after reviewing IMSA/IAFC's October 17, 1988 response, concluded that the Agreement conformed with the spirit and letter of the Commission's *Order*. You have provided no information in your petition to support modifying this conclusion, and we believe there is no reasonable basis for determining that the Agreement is contrary to the *Order*. For instance, concerning the phrase that "IMSA/IAFC will not in any way interfere with FreCoor's activities," the entire provision as set forth below makes clear that IMSA/IAFC maintains oversight and responsibility:

> IAFC/IMSA retains ultimate responsibility as the FCC designated frequency coordinator. It is understood that FreCoor has been delegated broad powers and has assumed significant responsibilities under this contract. IAFC/IMSA will conduct all of its FCC frequency coordination activity though FreCoor. IAFC/IMSA will not in any way interfere with FreCoor's activities unless IAFC/IMSA first determines that FreCoor's activity contravenes IAFC/IMSA's obligations and officially notifies FreCoor of this determination.

It is also noted that IMSA/IAFC's October 1988 response states that all frequency coordinations are performed under its control. While IMSA/IAFC acknowledges that certain sections of the Agreement limit IAFC/IMSA's day-to-day power over application processing, according to IMSA/IAFC, these provisions were added to avoid even the appearance that the officers of IMSA/IAFC could impermissibly interfere with the processing of an application and were included to ensure compliance with the requirements of the *Order* regarding non-discriminatory, sequential processing.

Significantly, IMSA/IAFC also reports that coordination fee adjustments are made by the Boards of Directors of both organizations, who review coordination activities twice a year. IMSA/IAFC reports, moreover, that the Chairmen of the IMSA and IAFC Radio Committees maintain day-to-day contact with the frequency coordination process and then report to their respective Boards. The Executive Directors of IMSA and IAFC also keep in contact with the frequency coordination process and report to their respective Boards, according to IMSA/IAFC.

The Agreement is not contrary to the *Order*, therefore, since IMSA/IAFC reviews the coordination activities of its contractor and retains full authority to modify or veto any FreCoor practice contrary to the Commission's *Order*. IMSA/IAFC can also cancel or decline to renew the Agreement if it believes that FreCoor has acted contrary to the interests of the users of the Fire or Special Emergency Radio Service. We are satisfied that the Congressional and Commission mandate that certified coordinators be representative of the users of the radio service(s) coordinated is not circumvented by the Agreement because IMSA/IAFC retains *de facto* as well as legal oversight and control over the contractor it selected.

IMSA/IAFC remains responsible to the Commission for fulfilling the obligations undertaken pursuant to the *Order* and, it is responsible for the actions of its contractor *vis a vis* the Commission. The Congressional mandate of representative coordinators, however, would not be furthered by a Commission decision superseding the Boards' judgment that coordination services are best performed on a contractor basis. A coordinator, in summary, has wide latitude to contract all or some of its coordination activity to a contractor, so long as it maintains reasonable oversight and control.

You also refer, in your petition, to cases where the Commission found that an unauthorized transfer of control of a broadcast station had taken place. You assert that these cases support your position -- even though frequency coordinators are clearly not licensees under the Communications Act of 1934, as amended -- because you assert that certification as a frequency coordinator is a privilege granted by the Commission, similar to the Commission's grant of a broadcast license.

Decisions regarding unauthorized transfers of control of Commission licensees shed no light on assertions that a Commission certified frequency coordinator is not complying with the *Order*. Your reliance on these Commission cases is misplaced. Certified frequency coordinators are not licensees and, therefore, are not governed by the rules and precedent concerning licensees. [3] Coordinators were certified by the Commission's *Order*, which provides the benchmark for their conduct. The Commission, moreover, as part of the general oversight activity contemplated when the 19 organizations were first certified, reviewed the Agreement and found it consistent with the *Order*.

Accordingly, your Petition for Decertification of the International Association of Fire Chiefs, Inc., the International Municipal Signal Association, and the Special Emergency Frequency Coordinating Committee as Frequency Coordinators in the Fire and Special Emergency Radio Services, filed with the Commission on February 27, 1989, IS DENIED. IMSA/IAFC's Motion to Dismiss IS DISMISSED as moot.

Sincerely,

Ralph A. Haller
Chief, Private Radio Bureau

Copies to: Emmitt Kitchen, Jr.
Alfred J. Mello
Martin W. Bercovici, Esquire

FOOTNOTES

[1] A copy of the Bureau's letter is attached hereto as Appendix A.

[2] IMSA/IAFC filed a Motion to Dismiss on April 21, 1989. The National Association of Business and Educational Radio (NABER) filed a response on April 21, 1989, as well. Teletech filed its Opposition to IMSA/IAFC's motion on May 12, 1989, and IMSA/IAFC filed its Reply on May 18, 1989.

[3] Section 310(d) of the Communications Act of 1934, as amended, for example, provides express limitations on the holding and transfer of Commission construction permits and licenses.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 89-624

In the Matter of

Represcribing the
Authorized Rate of Return
for Interstate Services
of Local Exchange Carriers

ORDER

Adopted: April 27, 1990; Released: May 4, 1990

By the Chief, Common Carrier Bureau:

1. On April 9, 1990, the Ameritech Operating Companies (Ameritech), pursuant to §65.103 of the Commission's Rules,[1] filed three requests for discovery seeking information and documents from the following parties to the captioned proceeding: the Consumer Coalition; the State of Indiana Office of Utility Consumer Counselor and the Office of the Consumers' Counsel of Ohio (Indiana/Ohio); and the General Services Administration (GSA). None of these parties has filed an opposition to the discovery request directed toward it.[2]

2. We hereby grant Ameritech's unopposed discovery requests. Consumer Coalition, Indiana/Ohio, and GSA are required to provide responses within 14 calendar days after release of this order. [3]

3. Previous discovery requests in this docket have produced voluminous responses. Experience has demonstrated that the Commission does not need the 8 copies of each such response that are required by §65.103(c) of the Rules. Therefore, in order to avoid waste of the time, money, and paper required to produce and file unneeded copies, we hereby waive in part the requirements of §65.103(c). Parties are directed to file an original and 2 copies of their responses with the Commission.[4]

4. Accordingly, IT IS HEREBY ORDERED, pursuant to §65.103(a) of the Commission's Rules, 47 C.F.R. §65.103(a), that the Request for Discovery filed April 9, 1990 by the Ameritech Operating Companies and directed toward the Consumer Coalition, the Request for Discovery filed April 9, 1990 by the Ameritech Operating Companies and directed toward the Indiana Office of Utility Consumer Counselor and the Office of the Consumers' Counsel of Ohio, and the Request for Discovery filed April 9, 1990 by the Ameritech Operating Companies and directed toward the General Services Administration, ARE GRANTED.

5. IT IS FURTHER ORDERED that the provisions of §65.103(c) of the Commission's Rules, 47 C.F.R. §65.103(c), ARE WAIVED to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 C.F.R. §65.103.

[2] Under §65.103(b), oppositions may be filed no later than 7 calendar days after requests for discovery are filed. 47 C.F.R. §65.103(b).

[3] *See* 47 C.F.R. §65.103(b).

[4] We also commend to the attention of all parties to this proceeding §1.49(a) of the Commission's Rules, which allows pleadings and documents to be printed on both sides of the paper.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1990—261-072/20016